89-1768

No. 89 -

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1989

JOHN S. SHIPLEY
and
ROCHELLE D. SHIPLEY, his wife

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DELAWARE, and JOSEPH B. GREEN, ESQUIRE, of GREEN & GREEN LAW OFFICES, and MICHAEL P. WALSH, Sheriff of New Castle County, Delaware, and MARGO EWING BANE, Prothonotary of New Castle County, Delaware

Respondents,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

JOHN S. SHIPLEY and
ROCHELLE D. SHIPLEY
609 Wildel Ave. New Castle,
Delaware 19720
(302) 656-5641

September 18, 1989

PRO-SE Petitioners

QUESTIONS PRESENTED

1. Did the District Court error granting summary to respondents?

2. Did the District Court error by not allowing petitioners a trial on the merits when there are genuine issues of material facts that have not been resolved?

3. Did the District Court error no allowing petitioners a trial by jury on the genuine issues of dispute?

4. Does section 1983 apply to constitutional violations of due process clause of the Fourteenth Amendment?

5. Does the District Court have jurisdiction over contract claims when there is no claim pending in any other court for contract violations?

6. Did the district court error not stating petitioners paid respondent First Federal Savings and Loan Association on March 9, 1984

all sums due and owning and and against on March 11, 1984 advancing petitioners mortgage after Judge Martin voided and vacated the default judgment on March 7, 1984 and handed his decision out to petitioners and respondents First Federal Savings and Loan Association and Joseph B. Green, Esquire in open court on March 8, 1984?

7. Did the District Court error not granting petitioners injunctive relief and other affirmative relief as is provided by 28 U.S.C.S. § 2201, specifically providing for declaratory relief against generally unconstitutional practices by respondents and discriminatory practices by respondents against petitioners?

8. Did the District Court error dismissing the claims of petitioners under sections 42 U.S.C.S., §§ 1982, 1983, 1985(3) and 1986 without a trial on the merits?

9. Did the District error not awarding damages to petitioners after ruling petitions due pro-

cess rights were violated?

10. Did the District Court error stating petitioners claim for violations was based on respondents not waiting twenty days before entering default?

11. Did the District Court error allowing respondents immunity for using 4(f) 4 and 55(b) (1) in combination with no notice to petitioners?

12. Did the District Court error not holding the respondents liable for conspiracy after declaring petitioners due process rights were violated?

13. Did the District Court error allowing defendants to be removed from default once respondent Joseph B. Green, Esquire, failed to answer the court in time prescribed by law once service was made?

14. Did the District Court error calling respondent Joseph B. Green, Esquire attorney informing him that petitioners were moving for

default?

15. Did the District Court error stating that they did not have original jurisdiction pursuant to 28 U.S.C.S., § 1331 and 1343?

16. Did the District Court error not holding respondent First Federal Savings and Loan Association for violations of due process under the contract?

17. Did the District Court error indicating Shipley's had been served in a previous action wen the Shipley's had never been served.

18. Did the District Court error forcing the Shipley's to keep Robert T. Vance when they never entered into an agreement with Robert T. Vance and could not reach an agreement?

19. Did the District Court error forcing the Shipley's to keep attorney Robert T. Vance was not working in there best interest?

20. The District Court error in concluding its facts of the case.

21. The District Court error stating petitioners were constructly served.

22. .The District Court error that the prothonotary enter a default judgment in the scire facias proceedings in **83LMY7**, pursuant to Delaware Superior Court Rule 55B1.

23. The District Court error stating that was not a premature judgment

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OPINIONS BELOW

The The decision of the Distric Court on August 26, 1985 is recorded in 619 F. Supp-421 (D Del. 1985). The District Court incorporated by reference Judge Wright's description of the background facts in Shipley I, 619 F. Supp. at 425-27 and is set fourth at pages Al to A41 of the appendix to this petition (App. Al to A41). The decision of the court of appeals, affirming the district court was without comment. App. A39 to A40.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1989, as is at forth at A84-A85. The Court has jurisdiction pursuant to 28 U.S.C. 1254 (1) and 2201.

STATUTES INVOLVED

28 U.S.C.S. § 1331 provides,

The Distrist Court shall have orig-

inal jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.S. § 1343 provides,

(a) The District Courts shall have original jurisdiction of any civil action authorized by law to be commerced by any person:

(1) To recover for damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, be any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 (42 USCS § 1985);

(2) To recover for damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Fitle 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statue, ordinance, regulation, custom or usage, of any right,

privilege or immunity secured by the Constitition of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.S. § 1982 provide,

Property rights of Citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. (R.S. § 1978).

42 U.S.C. § 1983 provides,

Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or usage

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to a status of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)).

42 U.S.C.S. § 1985 (3) provides,

Conspiracy to interfere with civil rights

(5) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another,

for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to inquire any citizen in person or proper you such account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engage therein do, or cause to be done, any act in futherance of the the object of such conspiracy, whereby another

is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have a action for the recovery of damages, occasioned by such injury or deprivation, against anyone or more of the conspirators.

(R.S. § 1980).

42 U.S.C.S. § 1986 Action for neglect to prevent conspircy.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section section (42 USCS § 1985), are about to be commited, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act, which such person by reasonable diligence could have prevented; and such damages maybe recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal

maybe joined as defendants in the action, and if the death of any party be caused by and such wrongful act of neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding five thousand dollars damages therein, for the benefit of the next of kin of the deceased, if there be one, and if there be no widow, then for the benefit of the widow of the deceased, if there be one and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be substained which is not commenced within one year after the cause of action has occured.
(R.S. § 1981).

STATEMENT

A. Facts.

On or about the 19th day of July, 1978, petitioners entered into a mortgage agreement with respondent, First Federal Sav-

ings & Loan Association of Delaware (hereinafter referred to as "First Federal") in the face amount of Twenty-Five Thousand Five Hundred Dollars ($25,500). Without the consent, agreement, respondent, First Federal, through its servants, agents, or employees, changed petitioners' account with certain cash "advances". In fact, petitioners never received any cash advances and have never authorized the same. Respondent, First Federal, further violated the terms of its agreement with petitioner in that they failed to give proper notice of default in order to give petitioners an opportunity to cure. On or about May 5, 1983, respondent, First Federal, through respondent First Federal through respondent Joseph B. Green, filed a Scie Facias Sur Mortgage against petitioners. This was a mortgage foreclosure action authorized by the State of Delaware. The Writ was filed in the office of respondent, Margo Ewing Bane, and service of

process was attempted by respondent, Michael P. Walsh, his servants, agents, employees, or deputies. Petitioners were never served with the the summons nor were they ever notified of the existence of the mortgage foreclosure action. However, under color of law, and pursuant to Delaware Superior Court Civil Rules 4 (f) 4 and 55 (b) (1). Respondent, First Federal, through the services of Respondents, Joseph B. Green, Esquire, obtained a default judgment against Petitioners Respondents, Joseph B. Green, then proceeded to list the property for Sheriff's Sale, at which time Petitioners finally received notice by way of Sheriff's Sale notice being posted on the property. Petitioners then attempted to stay the sale and have the default judgment vacated or stricken. After lengthy court battles, at which time Petitioners were represented Sue Sponte, the default judgment was vacated. As a result of the vacation of the default judg-

ment, Petitioners paid Respondent, First Federal, all sums which were due and oweing on the mortgage and in fact, on March 9, 1984 including late charges again on March 12, 1984 and again on May 11, 1984 putting Petitioners advance in there mortgage. Nonetheless, Respondent, Joseph B. Green, Esquire, who was present when payment was made on March 9, 1984 again applied to the Court for a default judgment, whereupon, on or about May 4, 1984, a judgment was entered against the Petitioners. This judgment was entered on the original summons with no additional pleadings or notice given to Petitioners and in spite of the fact the Petitioners' mortgage was then current and advanced. Petitioners again challenged the entry of the second default judgment and, after lengthy court proceedings, Petitioners and Respondent Joseph B. Green, Esquire, entered into a Stipulation whereby the default judgment would be vacated and the Petitioners would

have twenty (20) days to respond to Respondent, First Federal's original summons, which they have done. Petitioners have attempted to make payments since May 13, 1984 and have been refused by Respondent, First Federal the right to make payments. Petitioners went to respondent Margo Ewing Ewing Bane in September 1983, after their property was posted and told her that Petitioners were never notified of a action filed against them in the Superior Court of the State of Delaware. Respondent Margo Ewing Bane told Petitioners there was nothing she could do unless Respondent Joseph B. Green, Esquire, told her after she revised the record. Petitioner went to Respondent Michael P. Walsh, Sheriff of New Castle, County and informed him personally that Petitioners had not had an opportunity to defend their property piror to being posted for Sheriff's sale and Petitioners were denied access to the Sheriff's records in reference to Petitioners

property.

REASONS FOR GRANTING THE WRIT

The Writ should be granted because the District Court made up dates of when different court hearings had taken place to indicate that the respondents had not done any wrongs to the Petitioners.

The Writ should be granted because the outcome of this case will affect witness of citizen of the United States if the Respondents are not held liable for violating Petitioners Due Process rights under the Fourteeth Amendment of the United States Constitution when property is at stake.

The Writ should be granted because the District Court refused to hear the contract violations of the Petitioners and the Petitioners would be left without a remdy at law.

The Writ should be granted because, In Griffin v. Breckenrige, the Supreme Court

held that the Thirteenth Amendment provides one constitutional basis for a Section 1985(3) action. The Thirteenth Amendment prescribes acts that constitute badges or incidents of slavery. Although the Fourteenth Amendment by its terms applies only to state action, the Supreme Court has not decided whether the Fourteenth Amendment provides a constitutional basis for a Section 1985(3) action. However, there is nothing in any of the Supreme Court decisions on Section 1985(3) reviewed by Petitioners to suggest that the Fourteenth Amendment cannot provide a constitutional basis for Section 1985(3) action.

The Writ should be granted because the Court in Flagg Bros., Inc v. Brooks, observed the circumstances which would convert a private party relying on a state statue into a "state actor" for purposes of a 1983 must be determined on a case-by-case basis. Flagg Bros. established the so-called "joint action"

test, 436 U.S. at 157. And in an earlier case, the Supreme Court held that a private party becomes a state actor under § 1983 if that party is a willful participant in joint activity with the State or its agents". Adickes v, S.H. Kress & Co., 398 U.S. 144, 152 (1970), quoting, United States v. Price, 383 U.S. at 794.

The Writ should be granted because the District Court gave Respondents immunity after determining that Petitioners Constitutional rights had been violated. Claiming respondents acted in good faith.

The Writ should be granted because there are genuine issues of dispute that have not been resolved in the District Court and the District Court and the District granted Summary judgments to Respondents. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

CONCLUSION

The petition for a writ of certiorari should be granted because this case reguarding the decision of the District Court involves important constitutional questions that the Supreme Court would have an opportunity to clarify.

Respectfully submitted,

DATED:
September 18, 1989

John S Shipley
JOHN S. SHIPLEY and
Rochelle D.
ROCHELLE D. SHIPLEY
609 Wildel Ave.
New Castle, Delaware
19720
Telephone: (302)656-5641

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife,)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521 JRR
FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION OF)
DELAWARE, *et al.*,)
)
Defendants.)

ORDER

For the reasons expressed in the opinion of this date, the defendants' motions for summary judgment are granted.

United States District Judge

Dated: December 30, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife,)
)
Plaintiffs,)
PRO-SE)
)
vs.) CA 84-521 CMW
)
FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION OF)
DELAWARE (formerly)
known as (FIRST FEDERAL)
SAVINGS AND LOAN OF)
NEW CASTLE COUNTY)),)
et. al)
)
Defendants)

ORDER

AND NOW TO WRIT THIS 7th day of November 1984, it appearing from the affidavit of John S. and Rochelle D. Shipley filed herein, that defendant Joseph B. Green having not answered or otherwise moved with respect to the complaint in a timely manner, and the plaintiff having requested the entry of a default, it is

ORDERED, in accordance with Rule 55 (a) F.R.Cv.P., that a default be andit hereby is entered against the defendants.

John R. McAllister, Jr.
Clerk

Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S¿ and ROCHELLE
D. SHIPLEY,

Plaintiffs,

v.

FIRST FEDERAL SAVINGS
& LOAN ASSOCIATION OF
DELAWARE (formerly
known as FIRST FEDERAL
SAVINGS AND LOAN
ASSOCIATION OF NEW
CASTLE COUNTY); JOSEPH
B¿ GREEN, ESQUIRE of
GREEN & GREEN LAW
OFFICES; MICHAEL P.
WALSH, Sheriff of New
Castle County, Delaware; and MARGO EWING
BANE, Prothonotary of
New Castle County,
Delaware,

Defendants

Civil Action No.
84-521 CMW

ORDER

This 14th day of December 1984, after considering briefs submitted by the plaintiffs and defendants Joseph B. Green, after listening to oral argument in which each of the aforementioned parties participated,

and for the reasons set fourth in the Memorandum Opinion filed this date,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Entry of Judgment of Default is denied.

2. Defendant Joseph B. Green's Motion to Set Aside Entry of Default (entered November 7, 1984 as amended November 9, 1984) is granted.

3. Plaintiffs' Motion to Withdraw their Amendments to their Complaint is granted. All Amended Answers in Responses to Plaintiffs' Amended Complaint and filed after November 5, 1984 are hereby stricken.

4. Any further amendments to the pleadings shall be submitted to the Court by motion for leave to file an amendment before any amendment is filed with the Clerk of the Court. The procedures set fourth by the Court today confirm with Rule 15 of the Federal Rules of Civil Procedures.

5. This is a confirmation order of the rulings of the Court from the Bench on Monday, December 3, 1984.

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife, Plaintiffs)
)
vs.) CA 84-521
)
FIRST FEDERAL SAVINGS)
AND LOAN ASSOCIATION OF)
DELAWARE (formerly)
known as (FIRST FEDERAL)
SAVING AND LOAN OF NEW)
CASTLE COUNTY), et al)
)
Defendants)

AMENDMENT TO DEFAULT

Whereas, Plaintiffs requested entry of default against defendant Joseph B. Green; and

Whereas, an Order was entered on November 7, 1984 incorrectly stating that default is entered against the defendants.

IT IS ORDERED that the Default Order of November 7, 1984 is hereby amended as follows:

1. The default entered against the defendants is hereby stricken.

2. Default is hereby entered against defendant Joseph B. Green.

John R. McAllister, Jr.
Clerk

Date: ____________

____
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE)
D. SHIPLEY,)
)
Plaintiffs,)
)
v.) Civil Action No,
) 84-521 CMW
FIRST FEDERAL SAVINGS)
AND LOAN ASSOCIATION)
OF DELAWARE (formerly)
known as FIRST FEDERAL)
SAVINGS AND LOAN)
ASSOCIATION OF NEW)
CASTLE COUNTY); JOSEPH)
B. GREEN & GREEN LAW)
OFFICES; MICHAEL P.)
WALSH, Sheriff of New)
Castle County, Delaware;)
and MARGO EWING)
BANE, Prothonotary of)
New Castle County,)
Delaware,)
)
Defendants)

ORDER

This 28th day of March, 1985, after receiving letters from plaintiffs and from counsel for defendants Green and Bane, and for the reasons discussed in my letter to each of the parties sent this date,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Stay All Proceeding is denied.

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE D. SHIPLEY, Plaintiffs,	
v.	Civil Action No. 84-521 CMW
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DELAWARE, et al., Defendants	

ORDER

This 4th day of April, 1985, WHEREAS the Court has considered defendant Green's brief in support of his Motion For Sequestration filed February 14, 1985;

WHEREAS the plaintiffs have filed no response to defendant Green's motion in the intervening period; and for the reasons set forth in the Memorandum Opinion filed this day,

IT IS HEREBY ORDERED:

1. The plaintiff Rochelle D. Shipley is prohibited from attending the deposition of

John S. Shipley noticed by defendant Joseph B. Green for April 8, 1985 at 10:00 A.M.

2. The plaintiff John S. Shipley is Prohibited from attending the deposition of Rochelle D. Shipley noticed by defendant Joseph B. Green for April 9, 1985 at 10:00 A.M.

____
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE D.)
SHIPLEY,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521 CMW
FIRST FEDERAL SAVINGS)
AND LOAN ASSOCIATION)
OF DELAWARE; (formerly)
known as FIRST FEDERAL)
SAVINGS AND LOAN)
ASSOCIATION OF NEW)
CASTLE COUNTY); JOSEPH)
B. GREEN, ESQUIRE of)
GREEN & GREEN LAW OFFICES; MICHAEL P. WALSH,)
Sheriff of New Castle)
County, Delaware; and)
MARGO EWING BANE, Prothonotary of New Castle)
County, Delaware)
)
Defendants)

ORDER

This 10th day of May, 1985, upon consideration of several motions submitted by the parties and after a hearing at which counsel for each of the defendants and Mr. and Mrs. Shipley were present,

IT IS HEREBY ORDERED:

1. The Court will hear oral argument on plaintiffs' motion to stay related state court proceedings on May 30, 1985 at 3:30 P.M. in conjunction with the previously scheduled argument as provided in the Court's Order of May 6, 1985.

(a) On or before May 27, 1985, the defendants shall individually or jointly submit the following information:

(i) the names of the parties in the state court action.

(ii) a copy of the responsive pleading, e.g., complaint, answer, answer to counterclaims.

(iii) a brief summary of the state court proceedimgs to date.

(b) The plaintiffs may supply any of the items requested in part (a) above, but

should at least provide the Court on or before May 27, 1985 with a summary of the state court proceedings to date.

(c) The parties attention is directed to two cases which the Court believes are relevant: Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971).

2. The period for discovery is extended, but all discovery shall be completed by July 12, 1985.

3. The deposition of Mrs. Shipley shall commence on June 12, 1985 at 10:00 A.M. Mr. Shipley is not permitted to attend Mrs. Shipley's deposition as provided in the Court's Order of April 4, 1985. Each of the defendants is allowed to attend Mrs. Shipley's deposition and to ask her questions. The deposition shall continue throughout the day. If by 5:00 P.M. the deposition is not completed, the parties may ask the Court to extend

the time for taking Mrs. Shipley's deposition, but only for good cause shown.

4. The deposition of Mr. Shipley shall commence on June 13, at 10:00 A.M. Mrs. Shipley is not permitted to attend Mr. Shipley's deposition as provided in the Court's Order of April 4, 1985. Each of the defendants is allowed to attend Mr. Shipley's deposition and to ask him questions. The deposition shall continue throughout the day. If by 5:00 P.M. the deposition is not completed, the parties may ask the Court to extend the time for taking Mr. Shipley's deposition, but only for good cause shown.

5. Mr. Elzufon, the attorney for defendant Green, shall notify both Mr. and Mrs. Shipley by letter of the place for taking their depositions as provided above.

6. Mr. and Mrs. Shipley maybe accompained during their separate depositions by one observer in lieu of an attorney. The observ-

er's attendance is permitted solely for the purpose of observing the deposition. The observer is prohibited from advising Mr. and Mrs. Shipley on how to answer questions, or from coaching either of the plaintiffs during any recesses in the depositions. The observer is further prohibited from discussing aspects of the case with defendants' attorneys. At anytime during either of the deposition, the parties may briefly adjourn the deposition to apply to the Court for an order barring the further attendance of the observer based on conduct violating the foregoing restrictions. This paragraph modifies the conditions set forth in the Court's protective order of April 4, 1985 requiring sequestration of plaintiffs during their depositions.

7. During the discovery period, plaintiffs continue to have the right to notice and take depositions in accordance with the Federal Rules of Civil Procedure.

(a) the names of any individuals whose mortgage was foreclosed by the defendant during the period from January 1, 1983 through the date in which the suit was filed;

(b) the address of the properties mortgage by the individuals identified in part (a) on which foreclosure took place;

(c) identification of those properties listed in part (b) in which a writ of scire facias was sought in connection with an alleged non-performance of conditions set forth in the individual's mortgage.

9. The plaintiffs shall arrange a time with Mr. Sullivan, the attorney for the Prothonotary, by mutual agreement for inspecting public records relating to the list of names and properties by defendant First Federal Savings and Loan Association of Delaware. If the plaintiffs desire photocopies of these records, they must bear the cost of photocopying.

10. If, after inspecting these records,

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C.A. No. 85-5315

JOHN S. SHIPLEY and
ROCHELLE D. SHIPLEY

v.

FIRST FEDERAL SAVING AND LOAN ASSOCIATION OF

DELAWARE, et al.

Present: GIBBONS, HIGGINBOTHAM, and BECKER,

Circuit Judges

Submitted are:

1) By the Clerk, the within appeal for possible dismissal due to a jurisdictional defect; and,

2) Appellant's response to the Clerk's submission in the above-captioned case.

Respectfully,

Clerk

Enc.
SM-SHP-gmm

The foregoing Motion is granted.

By the Court

Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE D. SHIPLEY, Plaintiffs, v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DELAWARE (formerly known as FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW CASTLE COUNTY); JOSEPH B. GREEN, ESQUIRE OF GREEN AND GREEN LAW OFFICIES; MICHAEL P. WALSH, Sheriff of New Castle County, Delaware and MARGO EWING BANE, Prothonotary of New Castle County, Delaware Defendants,	Civil Action No. 84-521 CMW

ORDER

This 26th day of August, 1985, after hearing oral argument and upon consideration of the briefs submitted by defendants Bane and Walsh, and the plaintiffs, and the supplemental memoranda from all of the parties, and for the

reasons set forth in the Opinion filed this date,

IT IS HEREBY ORDERED:

1. The Sheriff of New Castle County is permanently enjoined from returning an alias writ of scire facias to the Prothonotary of New Castle directed at either John S. Shipley or Rochelle D. Shipley with the notation non-sunt inventi without also certifying to the Prothonotary that a letter with a copy of the writ has been sent by certified mail to the last known address of the individuals in question.

2. The Prothonotary of New Castle County is permanently enjoyed from accepting the return of an alias writ of scire facias from the Sheriff of New Castle County directed at either John S. Shipley or Rochelle D. Shipley with the notation non-sunt inventi without having received certification from the Sheriff that a letter containing a copy of the writ has

been sent by certified mail to the last know address of the individuals in question.

3. With respect to the remaining claims for damages set forth in plaintiffs' complaint, defendant Michael Walsh and defendant Margo Ewing Bane are granted summary judgment.

United States District Court Judge

PUBLISHER'S NOTE

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PUBLISHER'S NOTE

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PUBLISHER'S NOTE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE D.)
SHIPLEY,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521 JRR
FIRST FEDERAL SAVINGS)
AND LOAN ASSOCIATION)
OF DELAWARE, _et al._,)
)
Defendants,)

ORDER

For the reasons expressed in the opinion of this date, the defendants' motions for summary judgment are granted.

United States District Judge

Dated: December 30, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. and ROCHELLE D. SHIPLEY,

Plaintiffs,

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DELAWARE, et al.,

Defendants,

Civil Action No. 84-521-JRR

ORDER

This 3rd day of January, 1989, IT IS ORDERED that the attached pages 3, 4, 5, 12, 28 and 29 be substituted for those submitted with the Court's Opinion in the above-captioned matter dated December 30, 1988.

UNITED STATES DISTRICT JUDGE

complaint on June 8, 13, 14, 16, and 17, 1983, unsuccessful. On June 28, 1983, the writ was returned to the Prothonotary stating, "Non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on the 26th day of June, A.D., 1983"

On On July 3, 1983, First Federal requested by precipe the issuance of an execution writ levari facias for the Sheriff to sell the plaintiffs' property. The Sheriff received the writ on July 8, 1983. The basis for issuing this writ was that the Shipleys had been constructively served pursuaunt to Delaware Superior Court Civil Rule 4(f)(4). This rule provided that "in actions begun by scire facias, 2 returns of service of a consecutive writs shall constitute legal and sufficient service."[1] The Prothonotary ent-

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[1] Judge Wright held in Shipley I that this rule failed to provide the required notice to mortgagors such that they were denied due process under Delaware law. 619 F. Supp. at 436-38 & n.26.

ered a default judgment in the scire facias proceeding, pursuant to Delaware Superior Court Rule 55(b)(1), based on this constructive service. Although the house was advertive for sale on September 13, 1983, the sale was stayed and the house was not sold. This writ of levari facias was returned to the Prothonotary on September 19, 1983.

Next, the Prothonotary issued an alias writ of levari facias on September 21, 1983, directing the sale of the plaintiffs' property. As before, the sale was advertised, stayed, and the writ was returned to the Prothonotary on November 16, 1983.

In the meantime, on January 24, 1984, the plaintiffs petitioned the Delaware Superior Court to set aside the default judgment that was entered against them in July, 1983. They also sought to stay any further threatened sale of their property. On March 17, 1984, after Judge Bifferato had recused himself from the

case, Judge Martin vacated and voided the default judgment against the Shipleys. The Shipleys appealed this decision in their favor to the Delaware Supreme Court. The appeal was susequently dismissed.

On April 17, 1984, First Federal again sought to obtain a default judgment against the plaintiffs. The Shipleys did not respond by the motion's return date, and the Bank's motion's return date, and the Bank's motion was granted on May 4, 1984. On June 22, the plaintiffs moved in Superior Court to vacate the default judgment. First Federal agreed to vacate the judgment on June 26, 1984, and gave the plaintiffs twenty days to respond to the new complaint. The Shipleys responded to the complaint in a timely manner. Apparently proceedings in the state courts are presently inactive.

On September 21, 1984, the plaintiffs represented by an attorney, filed their pre-

sent action in this Court. On November 2, 1984, the Shipleys discharged their attorney and proceeded pro se until June 12, 1986, when the plaintiffs' present attorney appeared on their behalf and obtained permission to conduct additional discovery in order to prepare the plaintiffs' response to the present motions.

II

ISSUES PRESENTED

The issues that are relevant to the Court's determination of these motions for summary judgment are as follows: the plaintiffs have charged that the defendants acted under color of the fourteenth amendment and enforced by 42 U.S.C. section 1983, by using the state court rule providing the constructive service of process in mortgage foreclosure actions:

Rule 4 (f)(4).[2] Assuming that we will find that the defendants' actions were taken under color of state law, the plaintiffs urge us not to grant either defendant a qualified immunity from damages based on a good faith reliance on constructive service rule's validity. The plaintiffs have also advanced claims against the defendants under 42 U.S.C. section 1982, 1985(3), and 1986 based on rights guaranteed by the thirteenth and fourteenth amendments.

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[2] It also appears that the plaintiffs assert that the defendants violated their civil rights because they failed to wait the required 20 ays from the return of the last writ before requesting that a default judgment be entered pursuant to Rule 55(b)(1). However, the Court finds that "private misuse of a state statute does not describe conduct that can be attributed to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 941 (1982), and therefore, we will not address the plaintiffs' arguments as they apply to the statute's misapplication in this case.

WRIGHT, Senior Judge.

The civil rights motion for damages and injunctive relief arises out of efforts by First Federal Savings & Loan Association (First Federal) to foreclose a mortgage held on property owned by plaintiffs, John and Rochelle Shipley. Presently before the Court are separate motions for summary judgment by two of the defendants: the Sheriff of New Castle County, Michael Welsh, and the Prothonotary of New Castle County, Margo Ewing Bane. In addition, the Court has directed the parties to brief for possible summary judgment additional issues regarding the constitutionality of the notice provision which First Federal attempted to use in connection with its foreclosure procedures.

I. BACKGROUND FACTS

On July 19, 1978, the plaintiffs executed a mortgage, which named First Federal as the mortgagee, in connection with their

purchase of property and a house located 609 Wildel Avenue, Minquadale, New Castle, Delaware D.I. 98 (Exhibit H). This mortgage was recorded thereafter in the Office for the Recording of Deeds in and for New Castle County, Delaware. A short time later, First Federal instructed its attorney, Joseph B. Green, to initiate foreclosure proceedings against the Shipleys for alleged non-payment on their mortgage. D.I. 97A (Exhibit I).[1] Apparently service was requested by Green of February 2, 1981. Shortly thereafter, First Federal directed Green to discontinue the foreclosure proceedings. D.I. 97:2.[2] On August 12, 1983, some eighteen months after initiating the foreclosure proceedings, Green notified the Prothonotary of New Castle County to dismiss the action.

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[1] Defendant Green's "Exhibits of Letter (dated May 24, 1985) to Judge."

[2] Letter from Joseph B. Green (dated May 24, 1985).

Within six months of the dismissal, First Federal has renewed its instructions to Green to bring a foreclosure action which Green filed on February 23, 1983. Once again, First Federal rescinded its instruction within a short time and once again, Green so notified the Prothonotary.

On May 4, 1983, a third foreclosure action on the Shipleys' property was commenced Superior Court on a complaint of scire facias. It is the events arising out of this action that form the underlying basis of the Shipleys' claims. In connection with this third action, First Federal attempted to accomplish services by having a writ of scire facias sur mortgage served on the Shipleys by the Sheriff.

The Sheriff's affidavit offers the following account of the ensuring events:

> 3, In this particular case, a copy of the Sci. Fa. Sur Mortgage, writ, summons and complaint was received in my office on May 5, 1983, commanding the Sheriff to summon and serve the defendants, John S.

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Shipley and Rochelle D. Shipley. The address provided for service was 609 Wildel Avenue, Minquadale, New Castle DE. On May 9, 10, 11, 18, and 20, 1983, attempts were made by the deputies to serve the Shipleys with a copy of the summons and complaint. These attempts were unsuccessful either because there was no answer or only a minor was at home. No personal service was made. No copy of the summons and complaint was posted upon the property. No copy of the summons and complaint was delivered to either defendant. No copy of the summons and complaint was left at the Shipleys' dwelling house. As a result of the numerous attempts at service, the Sci. Fa. writ was returned stated: "Non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on the 26th day of May A.D., 1983,"

6. Subsequently, my office received in this particular case, an alias Sci. Fa. Sur Mortgage writ on June 6, 1983, for service of the summons and complaint upon the defendants at 609 Wildel Avenue, Minquadale, New Castle, Delaware. On June 8, 13, 14, 16, an 17, attempts at service were made upon Mr. and Mrs. Shipley. The at service were unsuccessful. On one occasion, there was no answer. On two other occasions, only minor children were at home. No personal service was made upon the defendants. No copy of the summons and mortgage complaint was delivered or read to the defendants personally. No copy thereof was left at the Shipleys'

dwelling house. On June 28, 1983, as a result of the unsuccessful attempts at service the alias Sci. Fa. writ was returned to the Prothonotary. The returned stated: "non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on 26th day of June, A.D., 1983".

7. On July 3, 1983, First Federal by precise, requested the issuance of an execution writ Levari Facias, for sale of the Shipleys' property by the Sheriff. Said writ, which was signed by the Prothonotary and witnessed by the Honorable Albert J. Stiftel, was received by the Sheriff on July e, 1983. Pursuant to said writ, the real property of the Shipleys at 609 Wildel Avenue, Minquadale, New Castle, Delaware, was advertised in the News Joural and New Castle Eagle papers for sale on September 13, 1983. The sale was stayed and the Lev. Fac. writ was returned on September 19, 1983, to the Prothonotary.

8. On September 21, 1983, an alias Lev. Fac. writ was issued by the Prothonotary commanding the sale of the real property of Mr. and Mrs. Shipley in execution. Again the sale was advertised as before. The sale was stayed and the writ was returned to the Prothonotary on November 16, 1983.

9. On January 18, 1984, a First Pluries Lev. Fac. writ was issued by the Prothonotary for sale of the real property of Mr. and Mrs. Shipley. Again the sale was advertised in the

> newspapers as before. The sale was stayed and the writ was returned to the Prothonotary on March 1, 1984.

D.I. 68:A-2-A-7 (Affidavit of Michael P. Walsh).[4]

The basic averments set forth in the Sheriff's affidavit are not disputed in plaintiffs' complaint. Plaintiffs allege that servants, agents, employees, or deputies" pursuant to Delaware Superior Court Civil Rule 4(f)(4) (hereinafter "Rule 4(f)(4)").[5] D.I. 1L16. This rule provides that in actions begun by scire facias, 2 returns without service of 2 consecutive legal and sufficient service." This provision for constructive service became the basis on which the default judgment was entered in the scire facias proceeding by the

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[4] Defendant Walsh's Opening Brief in Support of His Motion For Summary Judgment.

[5] Plaintiffs later maintained "Plaintiffs do not agree that service was attempted as plaintiffs have no way of knowing". D.I. 125:1 (Letter from Shipleys dated June 26, 1985). In view of the fact that the Shipleys have no evidence to the contrary, the Sheriff's affidavit must be taken as true.

Prothonotary pursuant to Delaware Superior Court Rule 55(b)(1) after receiving a request for entry of judgment from First Federal's attorney. D.I. 67:A-11.[6] Plaintiffs maintain that they "were never served a summons nor were they ever notified of the existence of the mortgage foreclosure actions." Id.

The Sheriff cause a circular to be posted in the Shipleys' yard in anticipation of the first sale that was scheduled for September, 1983 and this is how the Shipleys first learned that a default judgment had been entered.[7] D.I. L:16. The circular is captioned in bold large typeface -- "SHERIFF'S SALE". It goes on to describe the Shipleys' property. The bottom of the circular contains the following bold faced print: "SEIZED AND TAKEN IN EXECUTION AS THE PROPERTY OF JOHN S. SHIPLEY AND ROCHELLE D.

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[6] Defendant Margo Ewing Ban's Opening Brief in Support of Her Motion for Summary Judgment.

[7] A copy of the circular appears as Appendix A to this Opinion. See D.L. 98 (Exhibit A).

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SHIPLEY, HIS WIFE, AND TO BE SOLD BY MICHAEL P. WALSH, SHERIFF." A notable feature of the circular is the absence of any notice to the homeowners, in this case the Shipleys, of the availability of any legal process to set aside the impending real estate transection.

On January 24, 1984, the Shipleys filed in Delaware Superior Court a document captioned, "Petition for Relief from Judgment, or to Strike Judgment Was Never Entered, or to Stay Sheriff's Sale". D.I. 97:A (Exhibit 7). The purpose of the Petition was to set aside the default judgment that had been entered in early July of 1983, and to stay any futher threatened sale of their property. Thepetition was opposed by First Federal. A and accordingly, First Federal's Motion for a Default Judgment was granted on May 4, 1984. D.I. 97:A (Exhibit 13).

The Shipleys sought to appeal the Superior Court's entry of judgment and moved for a stay of the state court proceedings before the Dela-

ware Supreme Court. This appeal was dismissed as moot. On June 22, 1984, the Shipleys moved in Superior Court to vacate the default judgment and on June 26, 1984, First Federal agreed to vacate the default judgment, giving the Shipleys twenty days to answer, the Shipleys allege: "Service of Process by the Plaintiff is contrary to law and the due process requirements of the United States Constitution". D.I. 97:A (Exhibit 17). According to the parties, the state court proceedings are presently inactive, but they have not been formally stayed.

II. ISSUES PRESENTED

Defendant Bane and Walsh have separately moved for summary judgment.[8] Both argue that plaintiffs' complaint fails to state a cause of action against either of them, and to the extent that it does state a valid cause of action, plaintiffs should be barred by the doctrines of absolute and qualified immunity from recovering damages from them.

There are two senses in which a claim might be said to fail to state a cause of action. One is that the complaint may lack the requisite degree of specificity in its facutal allegations. For instance, conclusory assertions that defendant deprive plaintiff of his rights, without more, would not meet the pleeding standard set fourth to Rotolo v. Borough of Charleror, 532 F. 2d 920, 922 (3d Cir. 1976). This form of failing to state a cause of action is properly remedied by required the plaintiff either to cure any deficiency through amendment of their pleadings or, failing that, to dismiss with prejudice. Id. at 923.

Failure to state a cause of action in a second sense implies a more fundamental objection, namely, that the allegations, even after attaining the minimal level of specificity required of pleadings, do not reveal a basis on which relief can be granted. In this latter sense, failure to state a claim serves as an

adjudication on the merits. Defendants' motions press the issue of failure to state a claim in both of the foregoing senses.

Plaintiffs' complaint serves as a starting point to evaluate the defendants' contentions that plaintiffs have failed to state a claim, or in the alternative, that defendants are immune from liability for the claims stated. Inevaluating the claims of prose litigants,[9] the Court is obligated to construe plaintiffs' allegations liberally and, to the extent possible, with an eye toward facilitating an ultimate adjudication on the merits. See generally Haines v. Kernes, 404 U.S. 519, 92 S. Ct. 594 30 L.Ed. 2d 652 (1972).

Plaintiffs set forth a virtual laundry list of statutory and constitutional bases for

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[9] The complaint was drafted by an attoney in Pennsylvania.

imposing civil rights liability on defendants.[10] Viewed in isolation, plaintiffs' repeated claims of civil rights deprivation are nothing more that a collection of bare assertions. The Court, of course, must look beyond these assertions. The Court, of course, must look beyond

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[10] This list is summerized int the first paragraph of plaintiffs' complaint as follows:

> This action is brought pursuant to the Fourteenth Amendment of the United States Constitution in that Plaintiffs' right of the equal protection of the laws have been violated, Plaintiffs' right to due process has been violated, and the privilege and immunities clauses of Article 4 and the Fourteenth Amendment of the United States Constitution to redress the deprivation of rights, which is an immunity secured thereby. This action is also brought pursuant to 42 U.S.C.S., §§ 1982, 1983, 1985(3) and 1986, to secure the rights of Plaintiffs to make and enforce contracts, to he secure in their property as would a white citizem, to enforce the same basis as white citizens, to be protected from malicious prosecution, malicious abuse of process, unlawful attachment, and otherwise a deprivation of property, and to be free from conspriacy intended to deprive Plaintiffs of their Fourteenth Amendment; and further to protect Plaintiffs from conspiracies from persons knowing of Plaintiffs' constitutional rights having been violated and willfully failing to prevent same.

these assertions to the factual allegations underlying plaintiffs' claims.

At the core of plaintiffs' complaint there appears to be four different theories of how the Sheriff and Prothonotary violated the Shipleys' rights. For ease of of exposition, the Court will refer to these four theories as: (1) the "due process" claim; (2) the "corrective action" claim; (3) the "misinformation" claim; and (4) the "preferential Treatment" claim.

Of these, the due process claim appears to involve no significant dispute of fact among the parties. Basically, plaintiffs' claim boils down to the convention the entry of a default judgment was unconstitutional, because service of process was achieved constructively as provided in Rule 4 (f)(4), and defendants has not exhausted other reasonable means of giving the plaintiffs actual notice of the pending action. D.I. 1:18. The question posed is strictly legal in nature.

The remaining three theories are developed in less detail by the complaint. The corrective action claim charges that both the Prothonotary and the Sheriff, who allegedly had the power to protect the rights of the plaintiffs, were informed that the Shipleys had never been personally served and yet refused to either set aside the default or stop the property sale. D.I. 1:118. Although 111 of the complaint is largely conclusory, subsequent submissions by plaintiff make the factual basis for the Shipleys' assertions clearer.[11]

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[11] These submissions are:

Memorandum in Support of Plaintiffs' Motion in Opposition to Defendant Walsh's Motion for Summary Judgment, D.I. 59 (see attached affidavid); Memorandum in Support of Plaintiffs' Motion in Opposition to Defendant Bane's Motion for Summary Judgment, D.I. 60 (see attached affidavit); Shipleys' Answering Brief in Support of Their Motion in Opposition to Defendant Walsh's Motion for Summary Judgment, D.I. 79 (see statement of facts); Shipleys' Answering Brief in Support of their Motion in Opposition to Defendant Bane's Motion for Summary Judgment; D.I. 82 (see statement of facts).

In effect, the Court regards these subsequent submissions as amendments to the factual allegations contained in the complaint. CF. McGruder v. Phelps, 608 F. 2d 1923, 1025 (5th Cir. 1979).

The misinformation claim set forth in 19 similarly must be read in light of plaintiffs subsequent submissions. It consists of two components: failure to render assistance to the Shipleys in getting the default judgment set aside, and suggesting to the Shipleys contend that whites received preferential treatment from the Sheriff and the Prothonotary in the access whites enjoyed to public records and in the "advice" they receieved to their inquiries. *See* D.I. 60 (Affidavit 11 5, 6).

In addition to the issues raised in defendants' motion for summary judgment, the Court must also consider matters on which it requested briefing. After receiving defendants' motions and reading Sheriff Walsh's affidavid, it appeared to the Court that there was no dispute as to the factual issues underlying the plaintiffs' constitutional challenge to the use of Rule 4 (f)(4) as a means of notice in scire facias proceedings. Accord-

ingly, the Court on its own motion raised the possibility of summary judgment for a non-moving party,[12] whereupon the Court directed the parties to provide additional briefing on three questions.[13]

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[12] Although it is unusual for a court to raise the possibility of summary judgment for non-moving party on an issue not currenttly before the Court, the Court believes such a procedure is contemplated by Fed.R. Civ.P 56 and authorized by precendent. See Viger v. Commercial Insurance Co., 707 F. 2d 769, 774 (3d Cir. 1983); see generally J. Moore & J. Wicker, Moore's Federal Practice ¶ 56.12 (2d ed. 1982). Moreover, because plaintiffs are not attorneys, they are simply not aware under what circumstances they may be entitled to summary judgment. Two of plaintiffs' submissions, D.I. 59 and 60, liberally construed, represent demands for judgment as a matter of law and therefore, could be regarded as requests for summary judgment.

[13] The questions on which the Court request briefing are as follows:

1, Are there disputed issues of fact that preclude the Court's determination as a matter of law whether constructive service as provided in Delaware Superior Court Rule 4(f)(4) satisfies the requirements of the Due Process Clause of the Fourteenth Amendment?

2. Does the fact that the default judgment, entered in the state court action that is the subject of this lawsuit, was vacated,

In response to the constitutional issues, posed by this court, both the Sheriff and Prothonotary disclaimed any interest in defending the constitutionality of the Delaware Superior Court Rules.[14] Instead, the Prothononatary and the Sheriff chose to rely on their defenses of qualified and absolute immunity to plaintiffs' action, adding that if the rules in question were declared unconstitutional, they would conform their conduct to the Court's ruling.

The Court expressly directed the parties' attention to the irrelevancy of the immunity defense to questions of injuctive

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or the fact that the plaintiffs have filled an answer in that action, preclude the Court from considering the constitutional issue set fourth in Question 1?

3. In light of the Supreme Court's decision in Mennonita Board of Missions v. Adams, 462 U.S. 791, 103 S.Cr. 2706, 77 L.Ed.2d 180 (1983), does constructive service, as provide in Delaware Superior Court Rule 4(f)(4), satisfy the requirements of the Due Process Clause of the Fourteenth Amendment?

[14] The Sheriff, through, his counsel, Theodore F. Sandstrom, wrote to the Court.

relief at oral argument on May 30, 1985.[15]

In response to the Court's letter to all parties dated June 25, 1985, defendant Walsh upon review, declines to submit a formal brief to those questions raised by the Court.
(Letter dated July 11, 1985).

The Prothonotary, through its attorney, Brian A. Sullivan, assistant county attorney, wrote to the Court:

> The Prothonotary respectfully submits that she is not in a position to defend the constitutionality of Delaware Superior Court Rule 4(f)(4).

(Letter dated July 11, 1985).

In addition to these two responses, the Court received correspondence from the two private defendants. First Federal, through its attorney, Frank Miller, argued that the Court should abstain from making a decision. (Letter dated July 15, 1985). The issue of abstention is addressed later. Defendant Green, through its attorney, John Elzufon, argued that it was unnecessary for the Court to decide the constitutional issue because the private defendants also intended a motion for summary judgment on grounds that the private defendants were also immune from damage liability. Defendants' argument ignores the fact that plaintiffs may be entitled to injuctive relief.

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[15] Oral argument was held prior to the requested supplemental briefing on the contitutional issues.

Apparently the defendant public officials have made a conscious choice not to contest injunctive relief for the Shipleys.

Defendants' calculated decision to refrain from defending the constitutionality of the procedural rules on which they relied, presents this Court with a fundamental question of whether they are proper parties to defend the constitutionality of Rule 4(f)(4). Article III of the Constitution limits the exercise of federal jurisdiction to "cases and controversies". Justiciability, as this requirement is sometimes referred, demands that federal courts resolve only questions arising out of the real interest of adverse parties. North Carolina v. Rice, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971); see also Flast v. Cohn, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 948 (1968).

The requirement of justiciability, of course, does not require this Court in consider whether a more suitable set of def-

end the state rules of civil procedure in question more vigorously; rather, the requirement is met if the "named defendants. . . ment the prerequisites to adjudiciation in a federal suit," See Finberg v. Sullivan, 634 F.2d 50, 53 (3d Cir. 1980) (en banc).

In this particular case, there can be no questions but that the parties' interests are genuinely adverse. Failure of defendants' immunity defense could lead to damage liability if it is determined that defendants are not entitled to immunity. Although the defendants have declined the Court's invitation to brief the constitutional question presented her, the Court notes for the record the failure of the Sheriff and Prothonotary to enter into a stipulation consenting to the use of procedures that would aviod the difficulties that were encountered in

this case.[16] Hence, there is no basis on which to conclude the present controversy is either feigned or collusive.

The Court believes that defendants' status as proper parties must ultimately turn on a subordinate issue, namely, the capacity in which these public officials have been sued.[17] The Sheriff or the Prothonotary can

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[16] If defendants' indifference to the prospect of injunctive relief could divest this Court of jurisdiction in constitutional questions properly before it, then a calculated policy of passive resistence would leave plaintiffs without any recourse for prospective relief.

[17] This issue is also of fundamental importance in determining the merits of defendant Bane's and Walsh's motions for summary judgment based on immunity. See infra Section V. There is no immunity for officials sued in an official capacity, Estate of Bailey v. County of York, at 9 n.5 (June 27, 1985) (SLIP OP.); see also Meding v. Hurd, supra. 607 F.Stupp. at 1101 (claims basrred by priciples of res judicate against town are also barred against town officials acting in an official capacity); and there is no good faith defense for public entities who are subdivisions of the state. Owens v. City of Independence, 445 U.S. 622, 100 Ct. 1398, 63 L.Ed.2d 673 (1979). Along with his public office, then it is assumed that the party is being sued in an official capacity. See

Other portions of the complaint, however, indicate that the public officials may have been sued in an individual capacity as well. Claims of isolated incidents of racial discrimination or the existence of the existence of a conspiracy to deprive plaintiffs of equal protection of the law are typically not actionable against a county because they do not reveal a custom or policy of the particular county, see Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct, 2018, 56 L.Ed. 2d 611 (1978); City of Oklahoma v. Tuttle, ___ U.S. 247, S.Ct. 2427, 85 L.Ed.2d 791 (1985); and hence, are not actionable against an official sued in his official capacity. Second, plaintiffs

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Restatment (Second) of Judgments (1980); see generally Meding v. Hurd, 609 F.Supp. 1088, 1101, (D.Del. 1985). Plainly the due process claim which challenges the validity of a Delaware Rule of Vicil Procedure is a claim typically brought against an official acting in an official capacity.

seek punitive damages which would not be avaiable in a suit brought against an official acting solely in an official capacity. See City of Newport v. Fact Conce s, Inc., 453 U.S. 247, S.Ct. 2748, 69 L.Ed.2d 616 (1981) (punitive damages are not recoverable against a town in an immity defense appeared to have assumed that plaintiff has sued each of the public officials in an individual capacity.[18]

Having determined that the public officials are sued both in an individual and official capacity with respect to the due process claim, it remains only to declare that public officials who intend to rely on statutory or judicial authority when acting in an official capacity are proper parties to constsies to constitutional challenges to actions taken pursuant to that authority. Finberg v. Sullivan, supra, 638 F.2d at 54 (citing Ex Parte Young, 209 U.S. 123, 157, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908)) (A public official,

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[18] See id.

sued in an official capacity, who "by virtue of his office has some connection with the enforcement" of the offending provision, is a proper party to an action challenging the constitutional validity of that provision.):

> This conclusion is not altered by the fact that the duties of the prothonotary and the sheriff are entirely ministerial. Under Ex Parte Young the inquiry is not into the nature of an official's duties but into the effect of the official's duties but into the effect of the official's performance of his duties in plaintiff's rights.
>
> . . . .
>
> Once the prothonotary and the sheriff have relied on the authority conferred by the (state's) procedure to work an inquiry to the plaintiff, they may not disclaim interest in the constitutionality of these procedures.

Id.

Accordingly, the Court finds that the Sheriff and Prothonotary are proper parties to defend the constitutional question

now before the Court.[19]

B. Mootness

Another aspect of the issue of justiciability, mootness, concerns whether a controversy presents issues, the resolution of which will entitle one party to some form of judicial relief that will have a concrete and conclusive effect on the parties' legal interests. See California v. San Pable & T.R.R., 149 U.S. 308, 314, 13 S.Ct. 876, 878, 3/ L.Ed. 747 (1893). The issue of mootness arises in this case because the default judgment against

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[19] In Finberg, the Third Circuit also considered and subsequently rejected the idea that the Justices of the Supreme Court of Pennsylvania, who were ultimately responsible for promulgation of Pennsylvania's Rule of Civil Procedure, were required to be joined as necessary parties. Similarly, the Court in this instance cannot say that Justice of Delaware's Supreme Court are necessary parties to this action merely because the constitutionality of one of the Delaware's Superior Court Rules of Civil Procedure has been challenged.

the Shipleys has been set aside and the Shipleys has been set aside and the Shipleys have answered the original complaint in those proceedings. These actions raise the possibility that the Shipleys have effectively waived any defense in the state action based on constitutionally defective service of process.

Regardless of the effect given to the Shipleys; answer by the state court, neither the setting aside of the default judgment of the Shipleys' filing of an answer render the constitutional issue presented here moot. Although the constitutional issue raised in the federal and state actions are the same, the underlying causes of action are different. The federal action seeks redress for injuries allegedly sustained as a result of the use of an allegedly unconstitutional practive. The same constitutional issue ari-

ses in the state action solely as a defense to the pending mortgage foreclosure. The presence, absence, or even waiver of the constitutional injuries or of prospective relief against future injuries.

Defendants have argued that it may be unnecessary to decide the constitutional issue in view of their pending legal defenses to damage liability. If such defenses were successful, the only basis for considering the question would be for purposes of entering injunctive relief on behalf of the Shipleys. The Shipleys, however, may not be entitled to either injunctive relief or declaratory relief, if, as it now appears, the problem of service has been curved in the state court proceedings. Any declaration of their rights under such circumstances would amount to an advisory opinion by this Court.

Courts have deviated from the strict rules against entertaining what might other-

wise by considered a moot controversy whenever the issue raised created a resonable exception of repetition without an opportunity for judicial review. See Southern Pacific Terminal Co. V. ICC., 219 U.S. 498, 515, 31 S.Ct. 279, 383, 55 L.Ed. 310 (1911); Finberg v. Sullivan, supra, 634 F.2d at 55; Dionne v. Bouley, 757 F.2d 1344, 1348 (1st Cir. 1985). The facts in this case appear to present such a situation. The defendant First Federal has initiated a mortgage foreclosure against the Shipleys three times. Moreover, it appears that First Federal uses the pending foreclosure proceeding as a means to encourage the mortgagor to cure any delinquency in payments, but once the payment is made, First Federal proceeds to dismiss the action, precluding a resolution of the constitutional question. Finally, defendant have little incentive to obtain a decision on the merits of the constitutional issue within the context of the mortgage foreclosure proceedings. Although

defects in service may provide a means to obtain a temporary dismissal of the foreclosure proceeding, many defendants will choose to waive defects of service and pursue the substantive merits of the action. Thus despite a significant question regarding the constitutional adequacy of service, the question is likely to remain unanswered if a defendant in the state court proceedings is relegated to bringing it up in the context of a foreclosure action. Accordingly, the Court concludes that present case is not moot.

C. Abstention

In response to the Court's letter of July 25, 1985, First Federal suggested that the district court abstain from deciding the constitutional issue raised in plaintiffs' complaint in the federal action because it is identical to one raised in the Shipleys' answer in the state court proceeding. (Miller letter dated July 15, 1985). Abstention is a multifaceted doctrine of "our federalism" in

which federal courts as a matter of equitable self-restraint, stay the exercise of juridiction pending resolution of state law issues that may obviate the need for constitution adjudication, see Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), or pending the completion of concurrent proceedings in a state judicial form when a decision by the federal court would interfere with the state's judicial administration of its legitimate activities as a sovereign. See Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Presummable, First Federal means to raise the possibility of Younger-type abstention, since the present controversy does not involve any doubtful issues of space law.

If the merits of abstention turned in anyway on defendants' conduct in raising the issue, this Court would summarily deny the request. The issue of abstention was implicitly before the Court when the plaint-

iffs moved the Court to stay the state court proceedings.[20] In response to the Court's request for briefing on Younger, see Order dated May 10, 1985, First Federal joined in a letter filed by another defendant stating that the defendants would not oppose plainfiffs' request for a stay. See Miller letter dated May 28, 1985. On May 30, 1985, First Federal announced in open court that it was prepared to enter a stipulation with the Shipleys staying the state court proceedings. Only after the Court requested briefing on the constitutional issure did First Federal suffer a sudden change of heart regarding not only its willingness to stipulate to a stay of the state court proceedings but also its willingness to proceed with the federal cause of action.

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[20] Presumable the basis for such at stay would be cases such as Dombrowshi v. Pfister, 360 U.S. 479, 85, S.Ct. 1116, 14 L.Ed.2d 22 (1967) and Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151, 32 L.Ed.2d 705 (1972).

The propriety of abstention, however, does not rest upon a defendant's conduct in raising the issue, but rather on self-imposed policies of judicial restraint. Thus, it is incumbent upon this Court to determine whether abstention is appropriate. The general rule, of course, is that "the pendency of a state court proceeding is (no) reason for a federal court to decline to exercise jurisdiction established by Congress." Harris v. Pernsley, 755 F.ed 338, 345 (3d Cir, 1985); cf. Kline v. Burke Construction Co., 260 U.S. 226, 230, 43 S.Ct. 79, 81, 67 L.Ed.2d 226 (1922). Moreover, a Federal court is warranted in declining to exercise congressionally conferred jurisdiction only in exceptional circumstances. See County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, # L.Ed.2d 463 (1959).

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility equally with the federal courts, ". . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . ."

Zwickler v. Koota, 389 U.S. 241, 247, 88 C.Ct. 391, 395, 19 L.Ed.2d 244 (1967).

Younger v. Harris defined conditions when it is appropriate for a federal court to depart from the foregoing principles and abstain. While, as originally conceived, the Younger doctrine was limited to federal adjudication of constitutional questions during the pendency of state criminal proceedings, the Supreme Court has extended the Younger doctrine to some state civil proceedings as well. See Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (discip-

linary proceeding over which state supreme court exercised ultimate authority); Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (child custody proceedings); Trainor v. Hernandez, 431 U.S. U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (state civil action to recover welfare payments); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed. 2d 376 (1977) (state civil contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 376 (1975) (state initiated proceedings under civil statute restricting the showing of obscene films). These cases have generally been construed to hold that abstention is appropriate in the face of pending state civil actions when the state is a party in the underlying state court proceeding and the state court proceedings were initiated by the state. Harris v. Pernsley, supra, 755 F.2d 1008, 1019 (3rd Cir. 1981); accord Traughber v. Beauchane, 760 F.2d 673, 680

(6th Cir. 1985). Because the underlying state action did not involve public officials, and because it was initiated by First Federal, a private litigant, both conditions for abstention are absent in this situation. The mere fact that the Prothonotary and the Sheriff are named as defendants in the federal court action is simply not an adequate reason for abstaining.

D. Eleventh Amendment

The Eleventh Amendment bars the exercise of jurisdiction by the federal courts in actions at law or equity brought by private citizens against a state or any of its agencies. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 682, 102 S.Ct. 3304, 3313, 73 L.Ed.2d 1057 (1982). For purpose of the Eleventh Amendment, a state official acting in an official capacity is also protected by the amendment's grant of immunity from suit in federal court except in actions for injunctive relief alleging that the state

official's actions violate the federal constitution. See Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908). Although the Fourteenth Amendment conferred on Congress the power to set aside the immunity granted to states under the Eleventh Amendment, Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), Congress did not eliminate the immunity enjoyed by states in passing § 1983. Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

The public official defendants have not sought to raised a defense under the Eleventh Amendment. The Court, however, may raise it as an issue *sua sponte* because the amendment goes to the Court's subject matter jurisdiction. Edelman v. Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1362-63, 39 L.Ed. 2d 662 (1974). The Court believes the Eleventhe Amendment concerns are implicated in plaintiffs' action insofar as it seeks to maintain

an action against the Sheriff and Prothonotary acting in their official capacities.

Typically, the Eleventh Amendment does not extend to suits against counties or municipalities, Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Moreover, there is no good faith (absolute or qualified) immunity under § 1983 for county officials acting in an official capacity since a suit against a county official acting in an official capacity is one against the county he represents, and counties are not entitled to assert a defense of qualified immunity. See Oven v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)[21] Thus, it would appear that the county could be held liable for any constitutional injury to the plaintiffs caused by the Sheriff and Prothonotary, acting in an official capacity as county

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[21] See supra, note 17.

officials.

While recognizing the foregoing priciples, the Court nevertheless is convinced that the part of plaintiffs' action which seeks damages against the Prothonotary and the Sheriff acting in their official capacities is barred by the Eleventh Amendment. Although technically employed by New Castle County, both the Prothonotary and the Sheriff act in a ministerial capacity under the lawa of the State of Delaware in connection with scire facias proceedings. See 10 Del.C. § 521 (prothonotary is to function as clerk of the Superior Court in which he serves); § § 2203, 2310, 2311 (prothonotary must record judgments, certify issuance of scire facias sur mortgage to recorder, and certify sheriff's return on levari facias); § § 5061, 5064 (directing sheriff to perform certain duties in connection with scire facias sur mortgage proceedings). Because the Court

finds that county officials who are defendants in this action should be regarded as officers of the state in scire facias proceedings, then the Eleventh Amendment bars an action for damages against these officials in their official capacity. See Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981).[22]

E. Pendent Jurisdiction

Plaintiffs' complaint does not purport to raise any state law claims that would require this Court to consider the exercise of pendent jurisdiction. However, in appearances before the Court, the plaintiffs have

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[22] In the alternative, the Court holds as a matter of law that an action based on plaintiffs' allegations of a denial of due process could not lie against the County because the official conduct of the Sheriff and the Prothonotary do not reflect the policy or custom of the County. See Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Accordingly, an action against the county officials, acting in an official capacity, based on similar allegations will not lie. Cf. Brandon v. Holt, supra, ___U.S. at ___, 105 S.Ct. at 880 (acting on behalf of identity present identical claims).

appeared to indicate a belief that this court will address the merits of the mortgage foreclosure action currently pending before the state court. In addition, plaintiffs have filed affidavits with the Court alleging conclusory terms that the Sheriff and Prothonotary violated the laws and court rules of the State of Delaware.[23] To avert any confusion, the Court wishes to empasize that it has not, nor will it, acquire jurisdiction over the matters currently being litigated

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[23] The plaintiffs averred:

> 8. Defendant Bane did not enter judgment against the Plaintiffs in accordance with the laws and Court rules of the State of Delaware.
>
> 9. Defendant Walsh proceeded to execute the Plaintiffs in connection with their real estate in violation of the lawas and Court rules of the State of Delaware.

D.I. 59 (Affidavit) & D.I. 60 (Affidavit).

in the state court.[24]

Normally, there would be no question that a federal court has no jurisdiction to consider a mortgage foreclosure action between citizens of the same state; such cases present issues of state's court. In actions properly before a federal court, a federal court can, in its discretion, exercise pendent jurisdiction over state law claims comprise a single case. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 752, 86 S.Ct. 1130, 16 L.Ed. 218 (1966).

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[24] It is not entirely clear to the Court whether citizens of Delaware have a private right of action under state law against public officials whose conduct does not conform to state law. Accordingly, plaintiffs' averments in their affidavits may state a wrong for which there is no cause of action at law. Moreover, the Eleventh Amendment renders this Court powerless to entertain equitable claims challenging the sufficiency of constructive service under Delaware law in connection with the scire facias sur mortgage proceeding. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 920-21, 79 L.Ed.2d 67 (1984). Thus, plaintiffs' state law claims against the Sheriff and the Prothonotary appear uncertain at best.

This Court declines to exercise pendent jurisdiction in this case because to do so would undercut the rule stated in Gold-Washing and Water Co. v. Keyes, 96 U.S. 199, 6 Otto 199, 24 L.Ed. 656 (1877), in which it was held that an action in state court in which the defendant asserted a defense based on a federal claim did not render the action removable to federal court. The Shipleys would not have been permitted to remove the mortgage foreclosure proceeding presently in state court based on their assertion in the state court action of a defense under the United States Constitution. Similarly, they should not be able to effect "removal" of their state claims through the Court's pendent jurisdiction by bringing an affirmative claim in federal court on the basis of the constitutional defense set forth in their answer in state court. Parties cannot use pendent jurisdiction to escape congressionally estab-

lished limitations on federal jurisdiction. *Cf*. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374-75, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978) (pendent jurisdiction cannot be used to circumvent rule of complete diversity in diversity cases).

IV. DUE PROCESS CLAIM

Plaintiffs claim that the Prothonotary's entry of judgment by default on the scire facias sur mortgage deprived them of property without due process. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Although the Due Process Clause imposes specific obligations on state offici-

als in depriving individuals of property interests, neither it nor any other part of the Constitution defines or creates those interests. Rather, property interest "are creates those interests. Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that supports claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. %¢$, %&&, (@ S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Under Delaware law, record title ownership is a cognizable property interest, *Brown v. Federal National Mortgage Association*, 359 A.2d.661, 663 (Del. 1976). In *Gelof v. First National Bank of Frankford*, 373 A.2d 206, 208 & n.3 (Del. 1977), the Delaware Supreme Court held the concept of property interest also included equitable

claims in title and liens of record. Indeed both the Brown and Gelof decisions held that 10 Del.C. § 5601 (the provision governing scire facias sur mortgage) was constitutionally deficient in failing to require notice be given to individuals who had interests that fell within the broader meaning of property as construed by the Delaware Supreme Court.

Nor can it be doubted that the Shipleys were deprived of an interest in their property through entry of the default judgment. Although the Shipleys were never evicted from their property, or denied access to their premises, their property interest were adversely affected in at least two ways. First, upon entry of judgment, their property became subject to levy by sale. Second, their position as litigants in the scire facias proceeding became less favorable in having to move to set aside the default.

While both Brown and Gelof establish that the scire facias proceeding implicated the Shipleys' property interests, mandating some sort of notice to the Shipleys, the decisions do not purport to address what constitutes adequate notice. In this case, the Sheriff and Prothonotary claim to have effected service pursuant to Rule 4 (f) (4) which provides "in actions begun by scire facias, 2 returns without service of 2 consecutive writs shall constitute legal and sufficient service." In effect, Rule 4 (f) (4) provides for constructive service: once sufficient effort has been expended to make the defendant aware of the pending action then the defendant is deemed to have been served. According to the Sheriff, he or his deputies visited the Shipley home at least ten times, all to no avail. The Sheriff never posted a copy of the writ on the Shipleys' property, nor sent a copy of it to the

Shipleys by mail. Understandably the Shipleys failed to respond to the writ for the simple reason they never received it. Pursuant to Del.Supp.Ct.R.Civ.P. 55 (b) (1), the Prothonotary was authorized to enter a default judgment twenty days after successful completion of service if defendant failed to respond.[25]

The narrow constitutional question, then, is whether constructive service pursuant to Rule 4 (f) (4), under the circumstances, comports with the fundamental requirements of due process. The Court finds that it does not.

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[25] In this particular case, the Prothonotary as was her practice when service had been effected constructively, did not wait twenty days after the time that service could be deemed to have occurred pursuant to Rule 4 (f) (4). Judge Martin of the Delaware Superior Court subsequently held that the Prothonotary's previous entry of a default judgment was set aside. First Federal Savings & Loan Association of Delaware v. Shipley, C.A. No. 83L-MY-7, (Del.Sup. March 7, 1984).

The requirements of due process do not vary depending on a controversy's characterization as either in personam or in rem. See Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 312, 70 S.Ct. at 656. Notice must, in either case, be reasonably calculated to apprise interested parties of the pendency of the action. Id., 339 U.S. at 314; 70 S.Ct. at 657.

The applicablity of the holding in Mullane to mortgage foreclosure proceedings was recently addressed by the Supreme Court in Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 180 (1983). In that case, the court held that a county's use of publication as a method of giving a mortgage constructive notice of the sale of his mortgagor's property did not meet the requirements of due process, because the county had at its disposal the necessary information to effect actual notice, with reasonable probability, by mail. Id., 462 U.S.

at 798, 103 S.Ct. at 2711. Although Mennonite Board of Missions concerned constructive notice by publication rather than constructive service, the same factors which led the Court to conclude that constructive notice by publication without separate notice by mail was constitutionally deficient compel a similar rejection of constructive service as a substitute for actual notice in this case. While due process does not always require actual notice, it does favor it whenever possible. Since the mails provide a feasible means of actual notice when the identity and address of a party are known, Mennonite Board of Missions suggests that mailed notice is an essential adjunct to any constructive notice provision.

In this case, the Prothonotary and the Sheriff knew the Shipleys' address but remained content to rely on personal service even after it became apparent to both offic-

ials that personal service had failed to provide the Shipleys with actual notice of the pending action. Under the circumstances, "the County's use of. . . less reliable forms of notice (was) not reasonable where, as here, an inexpensive and efficient mechanism such as mail service (was) available." Id., 462 U.S. at 799; 103 S.Ct. at 2711 (quoting Greene v. Lindsey, 456 U.S. 444, 455, 102 S.Ct. 1874, 1881, 72 L.Ed.2d 249 (1982).

The Sheriff did ultimately post the Shipleys' property with an advertisement of public sale as provided in 10 Del.C. § 4973 upon issuance of a writ of levari facias. But, from a constitutional perspective, the advertisement was too little too late. The advertisement was too late in that it was not posted until well after the default judgment had been entered. Moreover, it was too little in that it failed to provide plaintiffs with notice of how to either redeem

the property or how to initiate proceedings to contest the sale. _See_ _Memphis Light, Gas & Water Division v. Craft_, 436 U.S. 1, 13-15, 98 S.Ct. 1554, 1562-63, 56 L.Ed.2d 30 (1978) (public utility's notice of termination to a customer failed to satisfy due process because notice did not disclose process for contesting terminations); _cf_. _Finberg v. Sullivan_, _supra_, 634 F.2d at 62 (failure of county official to notify judgment debtor of the existence of exemptions under state and federal law in connection with creditors' garnishment of debtor's bank account did not satisfy notice requirements of due process). Thus, posting the advertisement did not discharge the County's obligation to provide the Shipleys notice in connection with the foreclosure proceeding.

For the foregoing reasons, the Court concludes that a mortgagor, deemed to have been constructively served is denies due

process under Delaware law in a scire facias proceeding unless an effort is made to provide the mortgagor actual notice by mail prior to entry of a default judgment.[26]

V. IMMUNITY FROM CIVIL DAMAGE LIABILITY

The Sheriff and Prothonotary claim that they are immune from plaintiffs' claims for damages under established doctrines of official immunity.[27] Although the doctrine of immunity for public officials has its

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[26] This is not to say that mailed notice is a satisfactory substitute for personal service when Delaware law prescribes otherwise. But notice by mail is a minimum constitutional precondition to a scire facias proceeding when actual notice by personal service has failed. Oddly enough it appears that tenants in an eviction proceeding are entitled to greater notice under Delaware law than the mortgagor subject to foreclosure. The notice given to tenants pursuant to 25 Del.C. § 5706 provides a concrete model of the type of notice mortgagors should receive when personal service fails to provide actual notice.

[27] Public officials cannot assert a defense based on immunity as a bar to prospective injunctive relief. *See* *Pulliam v. Allen*, ___ U.S. ___, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565 (1984); *DiRuggiero v. Rogers*, 743 F.2d 1009, 1021 (3d Cir. 1984).

foundations in the common law, the Supreme Court has refined the standards governing its application in response to the burgeoning number of suits against public officials that has followed the dramatic increase in civil rights and constitutional tort litigations over the past generation. In its public officials is evaluted under a bifurcated standard that provides for absolute immunity in some cases and qualified immunity in others.

Absolute immunity is a more potent form of immunity than any of its cousins because it discharges an official completely from all liability resulting from the exercise of official power without regard to negligence, malice, or bad faith on the part of the official in performing his duties. Generally speaking, this exceptional form of immunity is limited to special considerations regarding the type of function performed by officials who enjoy such immunity. Mitchell

v. Forsyth, ___U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Qualified immunity, as its name suggests, is immunity subject to condition. A public official is entitled to qualified immunity so long as his conduct does not violate clearly establiched law at the time an action occurred. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrines of absolute and qualified immunity apply to actions brought pursuant to civil rights provisions, including 42 U.S.C. § 1983. *See* *e.g.*, *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (absolute immunity enjoyed by prosecutor); *Wood v. Strickland*, 420 U.S. 309 (% S.Ct. 992, 43 L.Ed.2d 214 (1975) (school officials subject to qualified immunity); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed.2d 1019 (1951) (absolute immunity enjoyed by state legislator).

The immunity enjoyed by judges and other officials performing quasi-judicial functions is a frequently cited example of absolute immunity. Mitchell v. Forsyth, supra, ___U.S. at ___, 105 S.Ct. at 2813-14. It is important to emphasize the bradth of the immunity enjoyed by judges. Judicial acts taken in error, or with malice, or even in excess of authority are all subject to immunity, and thus, can never from the basis for a plaintiff's action against a judge. Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1105, 55 L.Ed. 331 (1978).

Both the Prothonotary and the Sheriff contend that they are entitled to absolute immunity because the gist of the Shipleys' complaint concerns actions in which the Sheriff and the Prothonotary were acting in a quasi-judicial capacity. While judicial immunity has been extended to clerks and prothonotaries when the clerk is "performing

a ministerial function at the direction of (a) judge, "*Waits v. McGowan*, 516 F.2d 203, @)¢ (3d Cir. 1978); *accord* *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); or performing ministerial duties of a judicial nature pursuant to a statute. *See* *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972); *accord* *Scott v. Dixon*, 720 F.2d 1542 (11th Cir. 1983), *cert.denied*, ___U.S. ___, 105 S.Ct. 122, 83 L.Ed.2d 64 (1984).

The immunity enjoyed by a clerk is only extends to a narrow range of activities which are truly judicial in nature. *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). With respect to his other official activities, the clerk is only entitled to qualified immunity. *Tarter v. Hury*, 646 U.S. 1010, 1013 (5th Cir. 1981).

These same principles also apply to sheriffs. Sheriffs enjoy immunity when they act in either a ministerial capacity or pur-

suant to the orders of a judge. See Slotnick v. Garfinkle, supra, 632 F.2d at 166 (1st Cir. 1980).

Since the scope of the Prothonotary's and Sheriff's immunity depends on the type of authority the defendant was exercising at the time of plaintiffs' alleged injuries, it is necessary to evaluate defendants' claims of immunity against the type of claims plaintiffs have alleged as a basis for recovery.

A. Plaintiffs' Due Process Claim

Plaintiffs seek to hold the Prothonotary and Sheriff liable for damages for entering a default judgment when service of the writ on which the judgment was entered was constitutionally defective. Since under Del.Sup.Ct.R.Civ.P. 55 (b) (1), the Prothonotary is given the authority to enter a default judgment against them. Accordingly, she is entitled to absolute immunity regardless of whether her actions were malicious

and plaintiffs' claim for damages on this count must fail.

the Sheriff's only connection to the entry of the default judgment against plaintiffs was his role in attempting to serve the writ. There is no evidence in the record inconsistent with the Sheriff's own affidavit that he visited the Shipleys' home numerous times. He returned two writs to the Prothonotary bearing the notation non sut inventi, he too is entitled to absolute immunity and accordingly, plaintiffs; claim for damages against the Sheriff based on a violation of their due process rights must also fail.

B. The Corrective Action Claim

Plaintiffs contend that the failure of the Prothonotary and the Sheriff to set aside the default judgment and impending sale after plaintiffs had explained to them that they never received actual notice of the mor-

tgage foreclosure proceeding prior to entry of the default judgment. Plaintiffs' theory is fatally flawed in at least two respects. First, it perpetuates a confusion regarding the distinction between the legal effect of Rule 4 (f) (4) on the one hand, and actual notice, this information was not relevant to either the Prothonotary or the Sheriff because of their belief that service in accordance with Rule 4 (f) (4) was all that was needed to enter the default judgment in the first place. Ultimately the Sheriff and Prothonotary proved to be wrong in their legal conclusion. At the very least, however, they would be entitled to qualified immunity for their actions because at the time that the events herein transpired, they were entitled to presume that Rule 4 (f) (4) was entirely valid.

There is a second flaw to this particular theory of recovery as it applies

to the Sheriff and the Prothontary. It assumes that the Sheriff and the Prothonotary had the power to set aside the sale and default judgment. To the extent that this proposition is false, the plaintiffs have failed to state a claim for relief under this count. While the Court finds this proposition highly dubious, it need not resolve its doubts for even if it were true, the power to set aside the judgment is essentially one that is judicial in nature. Thus, assuming that the defendant public officials possessed the power imputed to them, it would be judicial power for the exercise of which they are entitled to absolute immunity. Hence, neither the Sheriff nor the Prothonotary can be held liable for damages under plaintiffs' second theory.

C. The Misinformation Claim

The Prothonotary and the Sheriff cannot claim judicial immunity in response to

plaintiffs' allegation that they were shomhow misinformed by the Sheriff and Prothonotary in the advice they received to consult with the opposing attorney. D.I. 59 (Affidavit 3).[28] The defect in this allegation is that it fails to establish a claim for which either public official could be held liable. A party is free to accept or reject advice when it is offered. Having accepted it, plaintiffs cannot make it the basis of a civil rights claim merely because it did not work out. If there was any discernible merit in plaintiffs' claim, the Court would be inclined to dismiss a claim without prejudice as

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[28] Paragraph 3 reads as follows:

> Defendants Bane and Walsh, knowing that it would not be in the best interest of the Plaintiffs, consistently referred Plaintiffs to Defendant Green to resolve the sale of Plaintiffs (sic) real estate as opposed to directing Plaintiffs to the appropriate Court bodies.

provided in Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976). Here, however, the Court concludes that there are no set of facts on which plaintiffs' allegation would entitle him to recovery and accordingly, it is dismissed with prejudice with respect to the Sheriff and Prothonotary. See Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

D. The Preferential Treatment Claim

The Sheriff and Prothonotary are not entitled to either absolute or qualified immunity in connection with plaintiffs' allegation that whites received preferential treatment as compared with blacks in the defendants' respective police offices. Admittedly, the claim is set forth as a conclusory allegation without any additional supporting

facts. D.I. 59 (Affidavit 5 and 6).[29]

As such, the claim does not achieve the requisite degree of specificity in pleading that is required in civil rights actions. See Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978). However, this case is well beyond the pleading stages and the Prothonotary and the Sheriff have offered affidavits disputing plaintiffs' allegations. D.I. 67 (Affidavit of Margo Ewing Bane); D.I. 68 (Affidavit of Michael P. Walsh).

While it is undoubtedly true that the moving party bears the burden of demons-

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[29] Paragraphs 5 and 6 read as follows:

> 5. Defendants Bane and Walsh have not treated white individuals in the same or similiar situation in this manner, specifically misdirecting those individuals as they did the Plaintiffs.
>
> 6. Defendants Bane and Walsh embarrassed and humiliated the plaintiffs by failing to show them public records concerning the judgment and action against them to which Plaintiffs were entitled under state and federal law and did this sold.

trating the absence of any material issue of fact under Rule 56(c), this burden presumes that the non-moving parties' allegations are strong enough to support an inference that there are triable issues of fact. In this case, plaintiffs have offered neither evidence nor specific factual allegations to create a disputed issue of fact. In failing to do so, the non-moving parties have implicity reaffirmed their unamended pleadings. In view of the deficiencies theirin, the Court will enter summary judgment in the favor of the Sheriff and the Prothonotary on plaintiffs' claim that whites received preferental treatment.

VI. CONCLUSION

This motion for summary judgment represents a final adjudication of the plaintiffs' claims against the defendant Michael Walsh and defendant Margo Ewing

Bane. An injunction will issue enjoining the Sheriff from returning to the Prothonotary an alias writ of scire facias non-sunt inventi without also certifying to the Prothontary that a letter has been went by certified mail to the individual for whom service is sought and enjoining the Prothonotary from accepting an alias writ of scire facias non-sunt inventi without having received certification from the Sheriff that a letter has been sent by certified mail to the individual for whom service is sought. Although technically the injunction applies only to writs involving the Shipleys, the Prothontary and Sheriff would be well advised to reconsider some of their current practices.

The Court finds that plaintiffs are precluded from recovering any damages from the Sheriff and the Prothonotary with respect

to the claims raised in their complaint.

An Order will enter consistent with this Opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE S. SHIPLEY,)
his wife,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521-JRR
FIRST FEDERAL SAVINGS)
OF DELAWARE (formerly)
known as First Federal)
Savings and Loan)
Association of New)
Castle County) and)
JOSEPH B. GREEN, ESQUIRE of Green and Green)
Law Offices and MICHAEL)
P. WALSH, Sheriff of)
New Castle County,)
Delaware and MARGO)
EWING BANE, Prothonotary of New Castle)
County, Delaware,)
)
Defendants,)

ORDER

On this 20th day of January, 1988, the Court having held a hearing with Robert T. Vance, Jr., Esquire and Raymond Radulski, Esquire, representing plaintiffs, Frank J.

Miller, Esquire, representing defendant First Federal, and Edward A. Tarlov, Esquire, representing defendant Green,

IT IS ORDERED THAT:

1. The motion of Mr. Radulski and Mr. Vance to withdraw as counsel for the plaintiffs is denied.

2. Because the Court, from its observations of plaintiffs over the long course of this litigation, Delaware that plaintiffs cannot fully appreciate the legal issues involved in this case or the manner in which they should effectively present them, plantiffs shall not be permitted to proceed pro se.

3. Plaintiffs shall refrain from any further harassing of their attorneys. In this regard, telephone or personal contact between plaintiffs and their attorneys shall, until further notice, be initiated by Mr. Vance or Mr. Radulski. Plaintiffs shall be permitted to correspond with their attorneys

by letter.

4. The discovery deadline shall be extended until March 31, 1988.

5. Plaintiffs' Answering Brief in opposition to defendants' motions for summary judgment shall be filed on or before April 29, 1988. Defendants' Reply Brief shall be filed on or before May 20, 1988.

Dated: January 21, 1988

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521 JRR
FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION OF)
DELAWARE, *et al.*,)
)
Defendants,)

ORDER

For the reasons expressed in the opinion of this date, the defendants' motions for summary judgment are granted.

United States District Judge

Dated: December 30, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife,)
)
Plaintiff,)
)
v.) Civil Action No.
) 84-521 JRR
FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION OF)
DELAWARE, *et al.*,)
)
Defendants,)

Raymond M. Radulski, Esquire, Wilmington, DE; Robert T. Vance, Jr., Esquire, Brown & Vance, Philadelphia, PA: attorneys for the plaintiffs.

Frank J. Miller, Esquire, Wilmington, DE: attorney for defendant First Federal Savings & Loan Association of Delaware; John A. Elzufon, Esquire, and Lawrence S. Drexler, Esquire, Elzufon & Associates, P.A., Wilmington, DE: attorneys for defendant Joseph B. Green, Esquire.

OPINION

Dated: December 30, 1988
Wilmington, Delaware

ROTH, District Judge:

With this opinion, we attempt to terminate the tempestuous history of this case which has its genesis in the efforts of the defendants, First Federal Savings and Loan Association ("First Federal" or the "Bank") and its attorney, Joseph B. Green, to foreclose on a mortgage held on property owned by the plaintiffs, John S. and Rochelle D. Shipley. The plaintiffs have charged that the defendants violated their civil rights; they seek damages and injunctive relief. Previously, in _Shipley v. First Federal Savings and Loan Association of Delaware_, 619 F. Supp. 421 (D. Del. 1985) ("Shipley I"), this Court granted motions for summary judgment made by two of the original defendants, Michael Walsh, the Sheriff of New Castle County, and Margo Ewing Bane, the Prothonotary of New Castle County. _Id_. at 440-41. Presently before the Court are motions for summary

judgment by the two remaining defendants: First Federal and Joseph B. Green, Esquire.

I

FACTS

The parties have incorporated by reference Judge Wright's description of the background facts in Shipley I, 619 F. Supp. at 425-27. To ensure that the arguments made by the defendants in this motion are viewed in the appropriate light, however, the Court will recount, as briefly as possible, the factual record without citation.

On July 19, 1978, the plaintiffs took out a mortgage with First Federal named as the mortgagee in order to purchase their home at 609 Wildel Avenue, Minquadel, New Castle, Delaware. First Federal first attempted to foreclose on the planitiff's property on January 21, 1981, when its attorney, Green, commenced an action in Superior Court. Shortly thereafter, the Bank instructed Green to

discontinue the foreclosure proceedings. On August 12, 1982, Green instructed the Prothonotary of New Castle County to dismiss the action.

Green filed a second action for foreclosure, at the request of First Federal, on February 23, 1983. Within a short time, the Bank instructed Green to abandon the proceedings, and Green so notified the Prothonotary.

On May 4, 1983, Green commenced the third foreclosure action against the Shipleys' property in Superior Court on a complaint of scire facias. First Federal attempted to accomplish service by having the Sheriff service by having the Sheriff serve a scire facias sur mortgage writ, summons, and complaint on the Shipleys. The Sheriff's attempts to serve the plaintiffs personally on May 9, 10, 11, 18, and 20, 1983, were unsuccessful. The scire facias writ was returned

to the Prothonotary on May 26, 1983, stating, "Non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on the 26th day of May, A.D., 1983."

An alias scire facias sur mortgage writ was delivered to the Sheriff's office on June 6, 1983. The Sheriff's attempts to serve the Shipleys personally with the writ, summons, and complaint on June 8, 13, 14, 16, and 17, 1983, were once again unsuccessful. On June 28, 1983, the writ was returned to the Prothonotary stating, "Non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on the 26th day of June, A.D., 1983."

On July 3, 1983, First Federal requested by praecipe the issuance of an execution writ levari facias for the Sheriff to sell the plaintiffs' property. The Sheriff received the writ on July 8, 1983. The basis for issuing this writ was that the Shipleys had been constructively served pursuant to Delaware Superior Court Civil Rule 4 (f) (4).

This rule provided that "in actions begun by scire facias, 2 returns of service of 2 consecutive writs shall constitute legal and sufficient service."[1] The Prothonotary entered a default judgment in the scire facias proceeding, pursuant to Delaware Superior Court Rule 55 (b) (1), based on this constructive service. Although the house was advertised for sale on September 13, 1983, the sale was stayed and the house was not sold. This writ of levari facias was returned to the Prothonotary on September 19, 1983.

Next, the Prothonotary issued an alias writ of levari facias on September 21, 1983, directing the sale of the plaintiffs' property. As before, the sale was advertised, stayed, and the writ was returned to the

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[1] Judge Wright held in Shipley I that this rule failed to provide the required notice to mortgagors such that they were denied due process under Delaware law. 619 F. Supp. at 436-38 & n.26.

Prothonotary on November 16, 1983.

On January 18, 1984, a first pluries levari facias writ was issued, and the familiar events ensued: The sale was first advertised, then stayed, and finally the writ was returned to the Prothonotary on March 1, 1984.

In the meantime, on January 24, 1984, the plaintiffs petitioned the Delaware Superior Court to set aside the default judgment that was entered against them in July, 1983. They also sought to stay any further threatened sale of their property. On March 17, 1984, after Judge Bifferato had recused himself from the case, Judge Martin vacated and voided the default judgment against the Shipleys. The Shipleys appealed this decision in their favor to the Delaware Supreme Court. The appeal was subsequently dismissed.

On April 17, 1984, First Federal

again sought to obtain a default judgment against the plaintiffs. The Shipleys did not respond by the motion's return date, and the Bank's motion was granted on May 4, 1984. On June 22, the plaintiffs moved in Superior Court to vacate the default judgment. First Federal agreed to vacate the judgment on June 26, 1984, and gave the plaintiffs twenty days to respond to the new complaint. The Shipleys responded to the complaint in a timely manner. Apparently proceeding in the state courts are presently inactive.

On September 21, 1984, the plaintiffs, represented by an attorney, filed their present action in this Court. On November 2, 1984, the Shipleys discharged their attorney and proceeded _pro se_ until June 12, 1986, when the plaintiffs' present attorney appeared on their behalf and obtained permission to conduct additional discovery in order to prepare the plaintiffs' response to the

present motions.

II

ISSUES PRESENTED

The issues that are relevant to the Court's determination of these motions for summary judgment are as follows: the plaintiffs have charged that the defendants acted under color state law and violated their due process rights established by the fourteenth amendment and enforced by 42 U.S.C. section 1983, by using the state court rule providing for constructive service of process in mortgage foreclosure actions: Rule 4 (f) (4).[2]

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[2] It also appears that the plaintiffs assert that the defendants violated their civil rights because they failed to wait the required 20 days from the return of the last writ before requesting that a default judgment be entered pursuant to Rule 55 (b) (1). However, the Court finds that "private misue of a state statute does not describe conduct that can be attributed to the state," Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 941 (1982), and therefore, we will not address the plaintiffs' arguments as they apply to the statute's misapplication in this case.

Assuming that we will find that the defendants' actions were taken under color of state law, the plaintiffs urge us not to grant either defendant a qualified immunity from damages based on a good faith reliance on the constructive service rule's validity. The plaintiffs have also advance claims against the defendants under 42 U.S.C. sections 1982, 1985 (3), and 1986 based on rights guaranteed by the thirteenth and fourteenth amendments.

Although the defendants have moved separately for summary judgment, each raises similar arguments to persuade the Court to grant their motions. First Federal and Green both argue that summary judgment is appropriate because: (1) they did not act under color of state law and therefore could not violate the Shipleys' due process rights as established by the fourteenth amendment and enforced by section 1983; (2) even if they did act under color of state law, they are

entitled to a qualified immunity because of their good faith reliance on the validity of the state constructive service rules; (3) there is no proff of either racial discrimination or a racially discriminatory motive for the alleged violations under the various sections of the civil rights statute in title 42 of the United States Code; and (4) there is no proper allegation or proof of the conspiracy as charged by the plaintiffs.

A. The Standard for Summary Judgment. Rule 56 provides that a party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and t taht the moving party is entitled to a judgment as a mater of law." Fed. R. Civ. P. 56 (c). In accordance with this rule, it is not within the province of the district court

to decide issues of fact. The court is limited to determining "whether there is a genuine issue for trail." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The burden of proving that no genuine issues of material face exist rests on the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Gans v. Mudy, 762 F.2d 338, 341 (3d Cir. 1985). Likewise, to fend off a motion for summary judgment, the nonmoving party must produce specific evidence showing that there is a genuine issue for trial. See Celotex, 477, U.S. at 323; Jersy Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1109-10 (3d Cir. 1985). "Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. Furthermore, reliance on nothing more than mere assertions in the pleading is not permissible. Id. There must be enough evidence to enable a reasonable

jury to find for the nonmoving party on the issue for which summary judgment is sought. _Id_. at 249

Summary judgment may be granted if there is "evidence that is merely colorable . . . or (that) is not significantly probative." _Id_. at 249-50 (citations omitted). If the nonmoving party fails to make a sufficient showing of an essential element of the case for which that party has the burden of proof, the moving party is entitled to summary judgment as a matter of law. _Celotex_, 477 U.S. at 322. In deciding whether to grant summary judgment, a court must draw all inferences from the evidentiary sources in the record in a light most favorable to the nonmoving pary. _Adickes v. S.H. Kress & Co._, 398 U.S. 144, 157 (1970); _Chipollini v. Spencer Gifts, Inc._, 814 F.2d 893, 900 (3d Cir.), _cert. dismissed_, 108 S. Ct. 26 (1987).

We address the defendants' arguments

in turn with this standard for summary judgment in mind.

B. Section 1983 Claim. To succeed on a claim based on section 1983, the plaintiffs must demonstrate two elements. First, they must show that they have been deprived of a right secured by the constitution or laws of the United States. Second, they must show that the person depriving them of this right acted under color of state law. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 946 (1982). In order for us to find liability, the conduct allegedly causing the deprivation of the federal right must be fairly attributable to the state. This means that

> the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsibile. . . (In addition,) the party charged with the deprivation must be

> a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937. Here, since the plaintiffs allege racial discrimination, they must demonstrate facts indicating that the defendants acted under color of state law in depriving them of their civil rights. Cf. Drum v. Nasuti, 648 F. Supp. 888, 896 (E.D. Pa. 1986), aff'd mem., 831 F.2d 286 (3d Cir. 1987).

1. Acting Under Color of State Law. Both defendants claim that they were not actin under color of law, that their actions did not constitute state action,[3] and therefore,

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[3] If certain conduct is state action as delimited by the Supreme Court's decisions, then that action is also action under state law for purposes of § 1983. Lugar, 457 U.S. at 929. Thus, in this opinion, we use "state action" and "under color of state law" interchangeably.

they could not violate the Shipleys' constitutional rights provided by the fourteenth amendment and protected by section 1983. The plaintiffs, on the other hand, urge the Court to find that the defendants' actions were state action under the "joint action" or "action in concert" theory.

Because the law in this area is unsettled, determination of whether Green acted under color of state law is one with which reasonable minds may disagree. Universal agreement may be achieved, however, for the proposition that there is no clear-cut test for determining what action constitutes state action for purposes of the fourteenth amendment. "Only by sifting facts and weighing circumstances" can the legal significance of state involvement in private conduct be determined. Burton v. Wilimington Parking Authority, 365 U.S. 715, 722 (1961). We conclude after careful analysis of all relevant

facts and review of the most recent case law, that neither Green nor First Federal's actions, on balance, can be or should be characterized as state action.

First we will consider Green's arguments that he was not a state actor. Green urges us to conclude that he was not a state actor based on the proposition that "a private attorney, while participating in the trial of a private state court action, is not acting color of state law." Raitport v. Provident National Bank, 451 F. Supp. 522, 531 (E.D. Pa. 1978) (emphasis add) (quoting Hansen v. Ahlgrimm, 520 F.2d 768, 770 (7th Cir. 1975) (citations omitted)). While this may be true,[4] it does not answer the question in this case, namely, whether Green assumed

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[4] Although it is not necessary to adopt this position because this issue is not presently before the Court, we note that this proposition is consistent with our holding.

the role of a state actor by using the procedures in the Prothonotary and the Sheriff's offices. Green utilized these procedures while acting outside of his courtroom role as a trial attorney. Thus, the specific holdinngs in Raitport and similar cases do not compel, but merely support, the conclusion that an attorney is not a state actor with respect to action taken on behalf of his or her clients.

Other cases, however, have addressed whether an attorney acquires the label of a state actor based on non-courtroom activities. For example, in Arment v. Commonwealth Bank, 505 F. Supp. 911 (E.D. Pa. 1981), the plaintiff alleged that a bank and its attorney conspired to institute criminal proceedings against him to persuade him to pay a delinquent debt. Id. at 913. The district court stated that for an attorney to acquire the label of a state actor under a joint action theory, when acting outside

of his or her role as a courtroom advocate, the plaintiff must show that the "attorney 'conspired' with state officers who acted under color of state law," Id. at 914 n.6 (citations omitted). The court concluded that the private defendants in this case were state actors only after it had found that there was an unlawful agreement between the defendants and state officers to harass the plaintiff by instigating the criminal proceedings. Id. at 914-15.

Similarly in Drum v. Nasuti, 648 F. Supp. 888 (E.D. Pa. 1986), affid mem., 831 F.2d 286 (3d Cir. 1987), the district court examined a situation where the plaintiff alleged that three private attorneys and federal prosecuting attorneys had conspired to prevent him from pleading his choice of plea in a criminal action. Id. at 891. In determining whether the private attorneys were state actors for purposes of section 1983,

the court explained the

> (t)he requirement of action under color of law is satisfied . . . when a private person willfully participates in joint action with a state official. . . Thus, (to survive the defendant's motion for summary judgment,) plaintiff must demonstrate a genuine issue of material fact that there existed between the private defendant and hte state official an understanding, agreement, of conspiracy to deprive the plaintiff of a federal right. He must show a genuine factual issue of a combination, agreement, or understanding among the defendants. . . . These (sic) must also be a genuine factual issue that the defendants plotted, planned, or conspired together to carry out the chain of events.

648 F. Supp. at 897 (citations omitted). In Drum, because there was no evidence of a conspiracy or agreement, the court concluded that the private attorneys did not act under color of state law for purposes of section 1983. Id. at 902.

The decision in Hauptman v. Wilentz,

570 F. Supp. 351 (D.N.J. 1983), aff'd mem. 770 F.2d 1070 (3d Cir. 1985), reiterates this conclusion that an attorney is not a state aactor unless he or she conspired with state officials to deprive a person of his federal constitutional rights. In Hauptman, the plaintiff alleged that private attorneys, private citizens, and state officials conspired to violate her deceased husband's civil rights. The court found that there was insufficient specificity in the pleading of the conspiracy charges, stating that, to label private and state actors might have had a common goal; there must have been an agreement to pursue an unconstitutional goal. 570 F. Supp. at 381-82. In Hauptman, the court dismissed the plaintiff's claims because "it is well established that an attorney representing a client does not act under color of state by virtue of being an officer of the court." Id. at 382.

Lastly, in Chicarelli v. Plymouth Garden Apartments, 551 F. Supp. 532 (E.D. Pa. 1982), tenants charged that their landlord violated their civil rights by initiating an eviction proceeding. The court, as part of its holding, refused to label an attorney a state actor stating, "It is well-settled that the actions of a private attorney in representing a private client, including the use of process, do not constitute state action." Id. at 538 (emphasis added) (citing Henderson v. Fisher, 631 F.ed 1115, 119 (3d Cir. 1980) (per curiam) (state licensing and regulation of attorneys is insufficient to label them state actors)).

The decisions in Drum, Hauptman, and Chicarelli, which built on Arment's reasoning, are the most recent voices in our circuit on the joint action theory of finding private attorneys liable under section 1983. Under their analyses, Green's actions cannot

be labeled as state action unless there is evidence of a conspiracy or agreement between Green and state officials to violate the Shipleys' federal constitutional rights. Thus, we now turn to the plaintiff's allegation that there was a conspiracy between Green, First Federal, and state officials to deprive them of their federal constitutional rights.

The plaintiffs have failed to providevide proof that such a conspiracy or agreement existed. They allege that "First Federal and Green engaged in a conspiracy, between themselves and others, to violate the Shipleys' civil rights because of their ract." Plaintiffs' Ansqering Brief at 21 (D.I. 226). It appears that they claim that this alleged conspiracy violated both 42 U.S.C. section 1985 (3) and section 1983.

To succeed on a section 1985 (3) conspiracy claim, the Supreme Court has stated that four criteria must be met. The

plaintiff must demonstrated that (1) there was a conspiracy, (2) the conspiracy's purpose was to deprive a person or class of person or class of persons of the equal protection, or privileges and immunities, of the law, (3) there was an act in furtherance of the conspiracy, and (4) the person was either injured in his person or property or was deprived of a right or privilege of citizenship. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). We need not proceed past the first inquiry, however, because after months of discovery during which the plaintiff's counsel had access to all mortgage files in First Federal's possession (and, as requested, other documents and records) and during which the plaintiffs have deposed all of the Bank's employees, past and present, whom they sought to depose, First Federal's Rely Brief at 2 ID.I. 230), they have still failed to identify facts which could lead us

to conclude that there was, or even that there might have been, a conspiracy.

Assertions of a conspiracy, unsubstantiated by facts, are insufficient to overcome the defendants' motions for summary judgment. As the court in Drum stated:

> Agreement to commit an unlawful act lies at the heart of a civil conspiracy. Plaintiff cannot expect to rely upon bare assertions, conclusory allegations, or suspicious, regarding the conspiracy, to resist the defendant's summary judgment motion. . . . Broad or conclusory allegations of a conspiracy are insufficient.

648 F. Supp. at 897 (citations omitted). Accord Hauptman, 570 F. Supp. at 381-82. The plaintiffs have alleged that there was a conspiracy among the defendants, the Sheriff and the Prothonotary to deprive the Shipleys of their civil rights. They have provided no proof of such a conspiracy. The plaintiffs have alleged that there was an understanding

labeling these private defendants state actors. In essence, the labeling of attorneys, who use state-establiched procedures, as state actors would be contradictory to the wellsettled law that attorneys are not state actors jby virtue of being an officer of the court or merely because of state licensing and regulation of the legal profession. *Polk County v. Dodson*, 454 U.S. 312, 324 (1981); *Black v. Bayer*, 672 F.2d 309, 317-18 (3d Cir.) *cert*. *denied* 459 U.S. 916 (1982); *Henderson*, 631 F.2d at 1119. *Cf*. *Jackson v. Metropolitan Edison Co.*, 419 ULSL 345 (1974) (detailed government regulation of a business does not convert that business's private action into state action).

If we were to conclude that Green was a state actor for having used the state's foreclosure procedure, we would have to label actions taken by attorneys when using any

among the defendants, the Sheriff and the Prothonotary to ignore the 20 day waiting requirement in Rule 55 (b) (1). They have provided no evidence of such an agreement. Because we find that there is no evidence of a conspiracy, the defendants' motions for summary judgment on both the section 1983 conspiracy claim will be granted.[5]

Having concluded that there was no conspiracy between Green, First Federal, and state actors for purposes of the fourteenth amendment, we will reinforce this determination by examining the policy reasons against

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[5] Because a 42 U.S.C. § 1986 claim cannot be maintained unless there is a successful § 1985 (3) claim, Robinson v. Canterbury Village, Inc., 848 F.2d 424, 431 n.10 (3d Cir. 1988) (citing Rogin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980), cert. denied 450 U.S. 1029 (1981)), our disposition of the § 1985 (3) claim means that the defendants' motions for summary judgment on the § 1986 will also be granted. Id

state-established procedure as state action because a line cannot be drawn on a principled basis to distinguish the different actions taken by attorneys as part of their role as legal representatives for their clients.[6] See Lugar, 457 U.S. at 951 n.8 (Powell, J., dissenting). For example, if we were to label an attorney a state actor because he files papers with the Prothonotary

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[6] Although there is some authority for the proposition that the differential characterization of attorney's activities can be justified because holding that an attorney's courtroom activities are not state action protects the integrity of the judicial process and recognizes their independence of their actions from the state, Watertown Equipment v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1496 (8th Cir. 1987), cert. denied 108 S. Ct. 1723 (1988), we reject that this reasoning applies only to courtroom activities. In the absence of a factually substantiated claim of conspiracy between state officials and a private attorney, holding that the actions of a private attorney, taken in furtherance of his representation of his or her client, are not state action helps to protect the integrity of the entire legal process, of which the judicial process is but one cog.

and the Sheriff in seeking to foreclose on mortgaged property, we would also have to label him a state actor for filing articles of incorporation for a corporation, for filing state court papers to initiate a lawsuit, to enforce a judgment, or to notice an appeal, and for various other activities that attorneys normally perform on behalf of their clients. In each situation, the attorney uses state-created procedures to create or enforce legal rights of his or her client. As the Supreme Court stated in Lugar, in a society without limits on characterizing private action as state action, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." Lugar, 457 U.S. at 937. Likewise, in a society that characterizes attorneys' actions as state action,

attorneys could face "constitutional litigation" whenever they seek to use some state rule to protect or enforce the rights and interests of their clients. Outside of the attachment of property by state officials pursuant to the ex parte application of one party to private dispute, Lugar does not go that far. Id. at 941-42. Thus, we conclude that Green's use of the state foreclosure procedure was not state action, else we label all actions taken by attorneys involving state-created procedures as state action, else we label all actions taken by attorneys involving state-created procedures as state action, thereby constantly exposing lawyers to constitutional litigation for actions taken on behalf of their clients.

The plaintiffs, however, argue that the holdings in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), Cruz v. Donnelly, 727

F.2d 79 (3d Cir. 1984) (per curiam), and Robb v. City of Philadelphia, 733 F.2d 286 (3d Cir. 1984) compel the finding that Green was a state actor. Although these cases could be interpreted to conclude that private attorneys are state actors whenever state officials assist them in using state-established procedures, we decline to do so.[7] In our opinion, as we have already stated, it is not only unwise to advance such a policy, but the most recent case law indicates that such an interpretation, if ever viewed in a favorable light, is currently falling out of favor. We will discuss each of these cases briefly to indicate our disagreement with the statements in these opinions that, if adopted by this

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[7] We conclude that none of these case are controlling to our analysis because none addressed the issue of actions of a private attorney using state-created foreclosure procedures.

Court, would label Green a state actor.

In Lugar, a creditor sought prejudgment attachment of a debtor's property and filed an ex parte petition which resulted in the property being attached. The Supreme Court found that the private actor's actions were state action, but specifically limited its holding to the particular facts of the case: to "the particular context of prejudgment attachment" based on the ex parte application of one party. Lugar, 457 U.S. at 939 n.21. Further, and more importantly, the Court stated explicity that "we do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation: or "conspiracy" with state officials.'" Id. (quoting Powell, J., dissenting, 457 U.S. at 951). Thus, because the case sub judice does not involve a prejudgment attachment on the ex parte application

of one party to a private dispute, Lugar's analysis does not strictly apply, and we will not apply it by analogy.[8]

Cruz involved a plaintiff who had been strip-searched by two police officers at the request of a supermarket manager who suspected that the plaintiff was a shoplifter. In determining what constituted state action, the Third Circuit stated that the critical question to answer is "whether the state, through its agents or laws, has established a formal procedure or working relationship that drapes private actors with the power of the state." 727 F.2d at 82. In Cruz, the court answered this question in the negative and held that the defendants were not liable

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[8] We agree with Justice Powell that this limitation lacks a principled basis, 457 U.S. at 951 n.8, and note that the holding in Lugar has not been extended to other areas such as mortgage foreclosure actions.

under section 1983 because there was no indication that an agreement existed under which the policemen's judgment was subordinated to that of the supermarket chain or of the store manager.

Applying this test to the facts in the instant case, we find that Green did not impose his judgment upon that of a state official. We conclude therefore that Green was not a state actor. Although he did make application both to the Prothonotary and to the Sheriff in connection with the foreclosure proceedings, we find that neither office afforded Green's judgment any sperical significance. The Prothonotary's office was familiar with both Rule 4 (f) (4) and Rule 55 (b) (1). The employees there knew that service was perfected under Rule 4 (f) (4) only after two attempts at service were made. The state was not induced by Green's application to take

any action other than what would occur under the ordinary course of events when such an application was made.

Finally, in Robb, the Tird Circuit held that certain private individuals could be held liable under section 1983 if it were found that they had worked in concert with city officials and that their judgment has been substituted for the judgment of the ciry officials. The situation in the instant case is factually distinguishable. First, there is no evidence that Green worked in concert with the Prothonotary or Sheriff to deny the Shipleys their constitutional rights, supra. Second, as we have already concluded, this is a situation where Green did not substitute his judgment for that of a state official. Green merely took steps which set into motion procedures which the state had previously

determined to be appropriate. Viewed in this light, Robb is inapposite.

For all of the foregoing reasons we hold that Green's actions were not attributable to the state. Therefore, we hold that because he was not a state actor, Green cannot be held liable under section 1983 and his motion for summary judgment on the section 1983 claim will be granted.

First Federal also claims that it was not a state actor with respect to its involvement with the foreclosure proceedings. We note that First Federal's involvement in the foreclosure action was channeled through Green. Because we have already determined that Green's actions were not performed under color of state law, we conslude that First Federal's actions can not be attributed to the state, either.

Even if we had determined that Green were a state actor, however, First Federal is one step further removed from state action than Green. It had no contact with either the Sheriff or the Prothonotary. The Bank neither exercised its own judgment nor substituted the judgment of the state for its own: First Federal merely employed Green to protect its interest in the mortgaged property. Although it appears that the Bank may have been actively involved in directing the foreclosure proceedings, even if Green were a state actor, this would not render the Bank's action state action. It is well-settled law that one cannot be held responsible under section 1983 on a respondeat superior basis. Polk County, 454 U.S. at 325. Moreover, we find Judge Tjoflat to be persuasive in stating that the attorney, and not the client, is

responsible for the avenues of legal redress selected. Jones v. Preuit & Mauldin, 851 F.ed 1321, 1331-32 & n.6 (11th Cir. 1988) (Tjoflat, J., concurring). We adopt this reasoning in holding that First federal was not a state actor for pruposes of section 1983 regardless of the characterization of Green's actions.[9] Therefore, First Federal's motion for summary judgment on the section 1983 claim will be granted.

2. Qualified Immunity. Even though we have concluded that neither Green nor First

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[9] Judge Tjoflat correctly noted that resolution of this factual situation was not settled by the Supreme Court's opinion in Lugar. Preuit, 851 F.2d at 1331-32 n.7 Lugar applies strictly to a situation where the private person, without advice or guidance of counsel, makes an ex parte application under a state-created attachment procedure in the context of a pre-judgment attachment. Lugar did not address, and therefore does not apply to, the situation like the one in the instant case where the private party sought and uded the advice of counsel to protect his rights.

Federal was a state actor with respect to the actions they took in the foreclosure proceeding on the Shipleys' property, we will also examine whether either defendant would be entitled to assert a defense of qualified immunity if we were to characterize their actions as performed under color of state law[10] We conclude that, even if the defendants could be labeled as state actors, they would be entitled to assert and they would succeed on a defense of qualified immunity; thus, they would not be subject to section 1983 liability in this action.

Although section 1983 "creates a species of tort liability that on its face admits of no immunities," Imbler v. Pachtman, 424 U.S. 409, 417 (1976), the Supreme Court

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[10] In our analysis of this question, we treat the arguments made by the defendants Green and First Federal together.

has embraced the notion that, when Congress passed the Civil Rights Act of 1871, it intended to incorporate the immunities then existing at common law, See, e.g., Owen v. City of Independence, 445 U.S. 622, 638 (1980); Procunier v. Navarette, 434 U.S. 555, 561 (1978). At times, the Court has indicated that deciding whether an immunity exists should be a simple task of statutory construction to determine wheter the immunity existed at the time that the Civil Rights Act was passed in 1871. Wood v. Strickland, 420 U.S. 308, 216 (1975). However, the Court has also recognized immunities that did not exist at that time. For example, Imbler, the Court recognized an absolute immunity for prosecutors even though the first case to deal with the subject was decided well after passage of the Civil Rights Act. 424 U.S. at 420-29. In

determining whether an immunity defense should be available, the Court has also set out a two part test: what policies does an immunity serve and is the immunity compatible with the purposes of section 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981) (the promise of the statuts would be defeated by recognizing any pre-existing immunity without determining both the policies it serves and its compatibility with the purposes of section 1983).

Because the Third Circuit Court of Appeals has not addressed the issue of whether private defendants can assert a defense of qualified immunity in section 1983 suits, we will review the policy reasons in support of making such a defense available and explore if such a defense would be in accord with the aims of section 1983. We start our analysis

Lugar in which the Supreme Court, responding to the concerns of Justice Powell that private individuals might be found liable for innocently relying on state laws, stated that "this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials." 457 U.S. at 942 n.23. Thus, although the Supreme Court did not decide whether private individuals should be able to assert a qualified immunity defense, it strongly suggested that this should be permissible.

Next we note that this question is one which has divided the circuit courts of appeals that have addressed it. The First, Sixth, and Ninth Circuit Courts of Appeals

have held that private actors are not entitled to assert a defense of qualified immunity. Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied 439 U.S. 910 (1978); Ducan v. Pack, 844 F.ed 1261 (6th Cir. 1988)[11]' Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (conclusory assertion that "there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights"). But see Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (questioning, but not deciding, whether an independent contractor

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[11] Although the Court of Appeals for the Sixth Circuit held that private parties are not entitled to assert a qualified immunity defense, 844 F.2d at 1266-67, it permitted a private defendant to assert the common law good faith defense to malicious prosecution and wrongful attachment. Id.

not working for the state could assert a qualified immunity). The Eleventh, Tenth, Eighth, and Fifth Circuit Courts of Appeals, however, have held that private actors, in certain circumstances, are entitled to assert a defense of qualified immunity after they are characterized as a state actor for purposes of section 1983. Jones v. Preuit & Mauldin, 851 F.2d 1321, 1325 (11th Cir. 1988) (en banc); De Vargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 722 (10th Cir. 1988); Watertown Equipment Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1490 (8th Cir. 1987), cert. denied 108 S. Ct. 1723 (1988) (citing Buller v. Buechler, 706 F.2d 844, 850-53 (8th Cir. 1983)); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982).

Strong public policy reasons supp-

ort permitting private parties to assert a defense of qualified immunity in section 1983 suits. The most important reason for extending a qualified immunity defense to private citizens is that "(w)hen a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do with confidence that he need not fear liability resulting from the legislature's constitutional error of which he was unaware." Preuit, 851 F.2d at 1325. See also Buller, 706 F.2d at 851; Folsom, 681 F.2d at 1038. Further, as the Eleventh Circuit stated in Preuit, "What we encourage we ought not seek to punish." 851 F.2d at 1325. In this case, the judges of the Superior Court had duly adopted and promulgated Rule 4 (f)(4) and Rule 55 (b)(1). Both rules were used as a matter of course for many years in the state. There is every indication that the state sup-

ported the use of the rules concerning foreclosure.[12] Given these circumstances, we find that denying a private party a qualified immunity would do nothing more than "visit the effects of unconstitutional action by the legislature on innocent citizens," Folsom, 681 F.2d at 1037. We think that is inappropriate.

Furthermore, allowing the private section 1983 defendants here a defense of qualified immunity is supported by the fact that in Shipley I we permitted the Sheriff and the Prothonotary to assert a qualified immunity defense. We find the court's reasoning in Buller persuasive:

> (I)t would be anamolous (sic) to hold that private individuals are state actors within the meaning of section 1983 because they invoked a state

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[12] See inica p.27

> garnishment statute and the aid of state officers; but deny those private individuals the qualified immunity possessed by the state officials with whom they dealt because they technically are not state employees.

706 F.2d at 851 (footnotes omitted).[13] The holding in Lugar also supports permitting private parties to assert the same immunity as the state actors with whom they can equated for purposes of section 1983. As the court in Previt stated:

> (T)here is little reason to deny to private defendants the type of immunity which has been granted to public defendants. . . . (T)he logic of Lugar compels the conclusion that while private

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[13] Like the Buller court, we do not suggest that "the private defendants' qualified immunity is deprived from the state official whose aid they enlisted." 706 F.2d at 851, instead we reason that the immunity is based on a "functional" rather than a "derivative" approach, consistent with Supreme Court precedent. See, e.g., Forrester v. White, 108 S. Ct. 538, 542 (1988); Harlow, 457 U.S. at 810-13.

> individuals may sometimes be liable equally with public defendants under section 1983, they should never be held more liable. To deny private individuals such immunity would render private individuals more liable than public actors.

851 F.2d at 1325. Because we think it would be inappropriate to have private individuals more liable than state actors for alleged constitutional violations, we hold that private individuals who, be virtue of their actions, take on the appellation and function of state actor may assert a defense of qualified immunity in section 1983 suits.

Permitting private parties to assert a qualified immunity defense is further supported by the nature of the defense. A person who seeks to employ this defense must show that he or she acted in good faith. To have acted in good faith, the defendant must prove

that he or she did not know, or reasonably should not have known, that his or her actions violated clearly established constitutional rights. Preuit, 851 F.2d at 1325; Watertown, 830 F.2d at 1490 (citing Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982)). Cf. Ryan v. Burlington County, No. 87-5874, slip op. at 11 (3d Cir. Nov. 2, 1988).

The defendants in this case fully meet the requirements of good faith. Until Judge Wright declared that the notice provision in Rule 4 (f)(4) was violative of the constitutional guarantees of due process, Shipley I, 419 F. Supp. at 438-38 & n.26, it was accepted in the Delaware courts that the rule was constitutional and that therefore persons who used Rule 4 (f)(4) were not acting contrary to the Constitution. For example, at a hearing related to this case on February 17, 1984, in the Delaware Superior Court,

Judge Bifferato, addressing the Shipleys, stated: "They tried to serve you several times, and they couldn't do it in May. They than filed an alias writ and tried to serve you several more times at 609 (Wildel) Avenue . . . . And again it was unsuccessful. Now under Rule 4 (f) subsection (4) that service was proper." (D.I. 91 at 122-23) (emphasis added). Superior Court Judge Martin, in a letter to the Shipleys dated March 7, 1984, stated that "service is deemed to have been legal and sufficient (under Rule 4 (f)(4)) as of June 28, 1983, the date the alias writ was returned non-sunt inventi." (D.I. 97A at All) (emphasis added). Given these circumstances, in the face of recorded judicial support of Rule 4 (f)(4), we conclude that, as a practical matter, it would have been illogical for either Green or or First Federal to contemplate that the Rule was const-

itutionally deficient,[14] and that no additional deterrence could be achieved by punishing individuals who could not reasonably have known that their actions were improper. Under these conditions, therefore, we hold that in pursuing foreclosure under Rule 4 (f)(4) Green and First Federal acted in good faith that the rule was constitutional.

Finally, we conclude that allowing private individuals to assert a good faith defense promotes the public interest because it allows recovery against individuals who take action that they know, or reasonable should know, violates clearly established

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[14] As we stated in Shipley I, 619 F. Supp. at 436, the decisions in Brown v. Federal National Mortgage Association, 359 A.2d 661 (Del. 1976) and Gelloff v. First National Bank of Frankford, 373 A.2d 206 (Del. 1977) did not address the issue of adequate notice presented by this case, and they cannot therefore be said to have alerted either Green or First Federal that Rule 4 (f)(4) violated mortgagors' due process rights.

statutory or constitutional rights of others, but at the same time permits individuals to use presumptively lawful state statutes without fear of facing constitutional litigation. For this reason, the major goals of section 1983 are not compromised by allowing this defense: section 1983 is still able to deter unlawful conduct and is still able to compensate victims of those who in bad faith use state laws or court rules to violate other's constitutional rights. Therefore, we hold that even if Green and First Federal were found to be state actors, they would still be entitled to assert a defense of qualified immunity from the section 1983 claims. They would in that event still have no section 1983 claims would be granted on the ground of qualified immunity.

C. Section 1982 Claim. Section 1982 of Title 42 of the United States Code

provides that all citizens of the United States shall have the same rights as white citizens to inherit, purchase, lease, sell, hold, and convey real property. This section bars both private and public discrimination with respect to property rights; there is no requirement of state action. Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019, 2021 (1987) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)). While there is some authority for the proposition that statistical evidence can be used to establish racial discrimination in a section 1982 case, Lee v. Minnock, 417 F. Supp. 436, 439 & n.1 (W.D. Pa. 1976) aff'd mem. 556 F.2d 567 (3d Cir. 1977), the plaintiffs in this case have failed to produce statistical evidence that could persuade us that either Green or First Federal acted with a discriminatory intent or in a discriminatory manner.

We conclude that the plaintiffs have not shown that either Green or First Federal acted in violation of section 1982 for two reasons: the plaintiffs have failed to prove that either Green or First Federal acted with an intent to discriminate and, even if they do not need to prove intentional discrimination, the plaintiffs have failed to satisfy the requirements of making out a prima facie case under section 1982.

Turning first to the question of intent to discriminate, we find that the plaintiffs have failed to prove that either of the defendants acted with a discriminatory intent. Although section 1982 does not contain a requirement of proving discriminatory intent before imposing liability, two district courts in this circuit and several other courts have pointed out that such a showing is necessary. For example, in DeFrank v.

Pawlosky, 480 F. Supp. 115 (W.D. Pa. 1979) aff'd mem. 633 F.2d 209 (3d Cir. 1980), the court, after stating that section 1982 strikes at racially motivation discrimination and that it furnishes no basis for a cause of action for the benefit of litigants who fail to show this, 480 F. Supp. at 118, held that a nurse who was dismissed from her position without a hearing could not maintain a section 1982 cause of action absent a showing of an intent to discriminate on the basis of race. Another district court in this circuit, in dismissing the plaintiff's section 1982 claim based on his Italian heritage, held that a section 1982 claim that fails to allege an appropriate class-based discrimination must fail. Petrone v. City of Reading, 541 F. Supp. 735, 739 (E.D. Pa. 1982). In addition, the Court of Appeals for the Seventh Circuit in Phillips v. Hunter Trails Community Assoc-

iation, 685 F.2d 184 (7th Cir. 1982), stated in dicta that intentional racial discrimination is a concededly essential element" of a section 1982 claim. Id. at 187. In so stating, the court relied on the Supreme Court's holding in General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 378-91 (1982), that liability may not be imposed under section 1981, the "companion" provision to section 1982, without proof of intentional discrimination. 635 F.2d at 187. Finally, in Zemesky v. City of New York, 821 F.2d 148 (2d Cir. 1987), the Court of Appeals for the Second Circuit affirmed the district court's dismissal of a schoolteacher's section 1982 claim against city school officials because there was no allegation that "he was deprived of his rights as a result of any racial, ethnic, or class-based animus on the part of the defendants."

Id. at 150-51. See also Huertas v. East River Housing Corp., 674 F. Supp. 440, 454-55 (S.D.N.Y. 1987) (plaintiff is required to show discriminatory intent in section 1982 actions).

These cases support the requirement that plaintiff show an intent to discriminate on the basis of race before liability will be imposed under section 1982. The plaintiffs have not made this showing. As for Green, we have already concluded that he acted in good faith in using Rule 4 (f)(4). In addition, after months of discovery, the plaintiffs have failed to produce any evidence to demonstrate that Green used the rule in a disproportionate manner against black mortgagors or to suggest in any was that he acted with a discriminatory intent.

The plaintiffs first counter that Green's hearsay statement to Mr. Shipley, as

recounted by Mr. Shipley, that Green would violate the plaintiffs' civil rights in order to protect the interests of the Bank, proves that Green acted to violate their civil rights in violation of section 1982. This statement was allegedly made long after the foreclosure was commenced, and even if Green did make it to Mr. Shipley, it does not indicate a racially discriminatory intent. All citizens have civil rights; therefore, a statement that a person will violate another's civil rights does not automatically translate into a showing of an intent to discriminate on the basis of race. To so conclude would require a logical leap that we are unwilling to make. The plaintiffs have not produced one shred of evidence that would lead a reasonable mind to the proposition that discrimination based on race was ever intended by Green.

Next the plaintiffs argue that Green was familiar with the neighborhoods of New Castle County, that he knew that the neighborhood where the Shipleys resided was primarily black, and that he thus acted in a discriminatory manner knowing that it was probable that the Shipleys were black. The fact do not support such an argument. According to the 1980 census report for the block on which the Shipleys resided, there were 21 white and 4 black residents (all in the Shipley household). Green's Reply Brief at 9 (D.I. 227) and Appendix, Ex. F (D.I. 227A). In the greater area surrounding their home, only four percent of the residents described themselves as minorities. Id. Thus, contrary to the plaintiffs' assertion, the only reasonable guess that Green could have made, when receiving the information from the Bank about the Shipleys, was that they were not members

of a minority group. In further support of this position, Green represents in his affidavit, (D.I. 161A at 2, para. 9), that, when he is requested by First Federal to insitute foreclosure proceedings, he is given "ethnically 'neutral' information." The plaintiffs' Answering Brief at 19 (D.I. 226). In addition, when the foreclosure was begun, Green had not yet met the Shipleys. Therefore, the argument, predicated on the presumption that Green knew that he was foreclosing on a black family, must fail.

Assuming then that the plaintiffs need to show that Green acted with a discriminatory intent, they have failed to meet their burden of showing that a reasonable jury could find in their favor. For this reason they cannot survive Green's motion for sumary judgment.

As for First Federal, the plaintiffs

allege that First Federal acted with a discriminatory intent by directing Green to foreclose on their property. The plaintiffs allege that "approximately 50% of all First Federal mortgage accounts referred for foreclosure proceedings involve (b)lack mortgagors." Plaintiffs' Answering Brief at 17 (D.I. 226). However, they reached this conclusion after examining only 31 of 68 mortgage accounts against which foreclosure actions hed commenced but had since terminated. Id. at 17.[15] Although we believe that in order to make such a conclusion the sample must be larger, see e.g., Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2790 (1988) (flaws in the use of statistical evidence include "small or incomplete data sets and inadequate statistical

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[15] The other 37 accounts did not identify the race of the mortgagor. Plaintiffs' Answeing Brief at 17 (D.I. 226). Thus, the conclusion that roughly 50% of those foreclosed

(continued...)

techniques"), this is not the only weakness in the plaintiffs' use of statistics. The plaintiffs ask us to conclude that the Bank exhibited a pattern of racial discrimination because 50% of all mortgage foreclosures were sought against black mortgagors while only 15.1% of the population was black. Plaintiffs'

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15. (...continued)
upon were black is misleading. If the remaining 37 mortgagors were white, then only roughly 22% of those against whom the Bank sought to foreclose were black. If, however, all 37 were black,then roughly 76% of those against whom the Bank sought to foreclosure were black. Because the data sample is smell and the information is incomplete, no reliable inferences can be made from the statistic the plaintiffs cite.

On the other hand, the Bank has produced evidence showing that of the 68 accounts identified by the defendants, 26 were ultimately foreclosed. Of this number, nine belonged to black mortgagors and 17 belonged to white mortgagors. First Federal's Reply Brief at 3 (D.I. 230). Thus, of the actual number of mortgages foreclosed by the Bank, 38% belonged to black mortgagors. Further, the Bank has shown that a larger percentage of high loan-to-value mortgages, where the mortgagor is likely to be seriously delinquent at some point, belonged to blacks (60%)
(continue...)

Answering Brief at 17-18 (D.I. 226). This comparison of percentages is neither informative nor appropriate, however. After months of discovery, supra, the plaintiffs have failed to prove that blacks constituted less than 50% of the mortgagors who were in default.

The plaintiffs have also failed to show that First Federal foreclosed on a greater percentage of black mortgagors who were in default than of white mortgagors who were in default.[16] Racial discrimination is not shown by statistics which fail to proved this. The The first setp in a finding of racial discrimination could have been met if, for example, 150 blacks and 850 whites were in

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15. (...continued)
than to whites (40%). Id. at 4. Thus, the defendant Bank has produced evidence to refute the plaintiffs' allegations. In this situation, summary judgment is appropriate because the plaintiffs have failed to allege facts that would enable a reasonable jury to return a verdict in their favor. Anderson, 477 U.S. at 249.

[16] See supra note 15.

default.[17] This type of evidence would tend to show that blacks were trated differently han whites with respect to their property rights and thus that the Bank acted in violation of section 1982. In this case, however, there is an absence of this type of statistical evidence or any other evidence indicating a racially discriminatory intent.

Thus, assuming that the plaintiffs need to show that First Federal acted with a discriminatory intent, they have failed to meet their burden of showing that a reasonable jury could find in their favor. We conclude that the Bank's motion for summary judgement on the section 1982 claim is appropriate.

Assuming, on the other hand, that is not necessary intent, they must neverthe-

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[17] Although we provide this example for the sake of clarity, we do not adopt any particular differential necessary to indicate a policy or pattern of racial discrimination.

less satisfy the traditional requirements for making out a prima facie case under section 1982. Although the tradition test is not strictly applicable because it usually applies to either the sale or rental of real property, we conclude that they have not met the test is not strictly applicable because it usually applies to either the sale or rental of real property, we conclude that they have not met the test that would be analogous to their situation.

The traditional test, as announced by the Supreme Court in McDonnel Douglas v. Green, 411 U.S. 792, 802 (1973) and restated by the Court of Appeals for the Ninth Circuit in Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980), does not include a requirement of proving discrimina-

tory intent,[18] but instead requires the plaintiff to prove: "(1) that he or she is a member of a racial minority; (2) that he or she applied for and was qualified to rent or purchase certain property; (3) that he or she

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[18] Phiffer and other cases holding that an intent to discriminate need not be proven to establish liability under section 1982 can, perhaps, be reconciled with our previous dicussion of cases that indicate that such a finding is necessary on two grounds. First, we have not discovered a case decided since the Supreme Court's decision in Gerneral Building Contractors, 458 U.S. 375, that states that it is unnecessary to show an intent to discriminate in section 1982 cases. Therefore, it is possible that these cases are simply inconsistent with current Supreme Court jurisprudence. Second, the cases that have held that an intent to discriminate need not be shown, like Phiffer, have dealt with situations where the facts overwhelminely supported a finding of an intent to discriminate evidenced by a blatant and obvious refusal of a seller or renter or real property to deal with minority applicants. See e.g., Phiffer, 648 F.2d at 552. Exactly what evidence would suffice to make out a claim of intentional discrimination under section 1982 is unclear, but blatant and obvious refusal by sellers, renters, or mortgagees of real property to deal with minority applicants ought to satisfy this requirement. Cf. General Building Contractors, 458 U.S. at 388; Huertas, 674 F. Supp. at 455-56; Davis v. Mansards, 597 F. Supp. 334 (N.D. Ind. 1984).

was rejected; and (4) that the housing or rental opportunity remained available thereafter." Phiffer, 648 F.2d at 551 (citations omitted). In this situation, where the plainiffs allege that their civil rights were violated by the defendants' attempts to foreclose on their property, we conclude that to succeed on a section 1982 claim the Shipleys must prov the following elements: (1) that they are members of a racial minority; (2) that they were similarly situated to toher persons who had mortgages with First Federal in terms of their timeliness of mortgage payments; (3) that the defendants sought to foreclose on their property; and (4) that the defendants did not seek to foreclose on the property of white mortgagors who were similiarly situated to the Shipleys.

The Shipleys have not met their burden of establishing a prima facie case

of discrimination with respect to either Green or First Federal. Although it is undisputed that as blacks they are members of racial minority and that the defendants attempted on several occasions to foreclose on their property, the plaintiffs have failed to establish the other two requirements needed for a successful section 1982 claim in a foreclosure situation. Despite the probability that we are beginning to sound like a broken record, it bears repeating that after months of all-encompassing discovery, during which the plaintiffs' counsel had access to all mortgage files in First Federal's possession (and, as requested, other documents and records) and during which the plaintiffs have deposed all of the Bank's employees, past and present, whom they sought to depose, supra, the plaintiffs have still failed to produce evidence that either Green or First

Federal attempted to foreclose solely, primarily, or in a disproportionate way against black mortgagors. Just as section 1982 does not force a landlord to forego profits by renting to minority tenants who do not have the economic means to pay the rent, *Boyd v.* Lefrak Organization, 509 F.2d 1110, 1111-13 (2d Cir.), *cert*. *denied* 423 U.S. 896 (1975), *cf*. J. Kushner, *Fair Housing* § 2.08, at 32 (1983) (even under a "racial effects" test, where a racial impact establishes a prima facie violation of Title VIII, ability to pay would constitute a business necessity and thus an adequate defense to claims of discrimination by a landlord), we conclude that section 1982 does not force mortgagees to abandon their contractual rights designed to protect their investments with respect to minority mortgagors who are in default on their mortgages.

For all or the foregoing reaons, we conclude that he plaintiffs cannot survive the defendants' mortions for summary judgment on the section 1982 claim.

III

CONCLUSION

We will grant the defendants' motions for summary judgment on all of the plaintiffs' claims against them in this action and thereby preclude them from recovering damages from either defendant with respect to the claims raised in their complaint.

An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN S. SHIPLEY and)
ROCHELLE D. SHIPLEY,)
his wife,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 84-521
FIRST FEDERAL SAVINGS)
& LOAN ASSOCIATION)
DELAWARE, et al.,)
)
Defendants,)

ORDER

This 3rd day of January, 1989, IT IS ORDERED that the attached pages 3, 4, 5, 12, 28 and 29 be substituted for those substituted for those submitted with the Court's Opinion in the abover-captioned matter dated December 30, 1988.

UNITED STATES DISTRICT JUDGE

complaint on June 8, 13, 14, 16, and 17, 1983, were once again unsuccessful. On June 28, 1983, the writ was returned to the Prothonotary stating, "Non-sunt Inventi to John S. Shipley and Rochelle D. Shipley, his wife, on the 26th day of June, A.D., 1983."

On July 3, 1983, First Federal requested by praecipe the issuance of an execution writ levari facias for the Sheriff to sell the plaintiffs' property. The Sheriff received the writ on July 8, 1983. The basis for issuing this writ was that the Shipleys had been constructively served pursuant to Delaware Superior Court Civil Rule 4 (f) (4). This rule provided that "in actions begun by scire facias, 2 returns of service of 2 returns of service of 2 consecutive writs shall constitute legal and sufficient service.[1]

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[1] Judge Wright held in Shipley I that this rule failed to provide the required notice to mortgagors such that they were denied due process under Delaware law. 619 F. Supp. at 436-38 & N.26.

The Prothonotary entered a default judgment in the scire facias proceeding, pursuant to Delaware Superior Court Rule 55 (b) (1), based on this constructive service. Although the house was advertised for sale on September 13, 1983, the sale was stayed and the house was not sold. This writ of levari facias was returned to the Prothonotary on September 19, 1983.

Next, the Prothonotary issued an alias writ of levari facias on September 21, 1983, directing the sale of the plaintiffs' property. As before, the sale was advertised, stayed, and the writ was returned to Prothonotary on November 16, 1983.

On January 18, 1984, a first pluries levari facias writ was issued, and the familiar events ensure: The sale was first advertised, then stayed, and finally the writ was returned to the Prothonotary on March 1, 1984.

In the meantime, on January 24, 1984, the plaintiffs petitioned the Delaware Superior Court to set aside the default judgment that was entered against them in July, 1983. They also sought to stay any further threatened sale of their property. On March 17, 1984, after Judge Bifferato had rescused himself from the case, Judge Martin vacated and voided the default judgment against the Shipleys. The Shipleys appealed this decision in their favor to the Delaware Supreme Court. The appeal was subsequently dismissed.

On April 17, 1984, First Federal again sought to obtain a default judgment against the plaintiffs. The Shipleys did not respond by the motion's return date, and the Bank's motion was granted on May 4, 1984. On June 22, the plaintiffs moved in Superior Court to vacate the default judgment. First Federal agreed to vacate the judgment on June

26, 1984, and gave the plaintiffs twenty days to respond to the new complaint. The Shipleys responded to the complaint in a timely manner. Apparently proceedings in the state courts are presently inactive.

On September 21, 1984, the plaintiffs, represented by an attorney, filed their present action in this Court. On November 2, 1984, the Shipleys discharged their attorney and proceeded pro se until June 12, 1986, when the plaintiffs' present attorney appared on their behalf and obtained permission to conduct additional discovery in order to prepare the plaintiffs' response to the present motions.

II

ISSUES PRESENTED

The issues that are relevant to the Court's determination of these motions for summary judgment are as follows: the

plaintiffs have charged that the defendants acted under color of state law and violated their due process rights established by the fourteenth amendment and enforced by 42 U.S.C. section 1983, by using the state court rule providing for constructive service of process in mortgage foreclosure actions: Rule 4 (f) (4).[2] Assuming that we will find that the defendants' acting were taken under color of state law, the plaintiffs urge us not to grant either defendant a qualified immunity from damages based on a good faith reliance

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[2] It also appears that the plaintiffs assert that the defendants violated their civil rights because they failed to wait the required 20 days from the return of the last writ before requesting that a default judgment by entered pursuant to Rule 55 (b) (1). However, the Court finds that "private misuse of a state statute does not describe conduct that can be attributed to the state," Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 941 (1982), and therefore, we will not address the plaintiffs' arguments as they apply to the statute's misapplication in this case.

on the constructive service rule's validity. The plaintiffs have also advanced claims against the defendants under 42 U.S.C. sections 1982, 1985 (3), and 1986 based on rights guaranteed by the thirteenth and fourteenth amendments.

The decision in Hauptman v. Wilentz, 570 F. Supp. 351 (D.N.J. 1983), aff'd mem. 770 F.2d 1070 (3d Cir. 1985), reiterates this conclusion that an attorney is not a state actor unless he or she conspired with state officials to deprive a person of his federal constitutional rights. In Hauptman, the plaintiff alleged that private attorneys, private citizens, and state officials conspired to violate her deceased husband's civil rights. The court found that there was insufficient to claim that the private and state actors might have a common goal; there must have been an agreement to pursue an

unconstitutional goal. 570 F. Supp. at 381-82. In Hauptman, the court dismissed the plaintiff's claims because there was no evidence that there was an agreement and because "it is well established that an attorney representing a lient does not act under color of state law by virtue of being an officer of the court." Id. at 382.

Lastly, in Chicarelli v. Plymouth Garden Apartments, 551 F. Supp. 532 (E.D. Pa. 1982), tenants charged that their landlord violated their civil rights by initiating an eviction proceeding. The court, as part of its holding, refused to label an attorney a state actor stating, "It is well-settled that the actions of a private attorney in representing a private client, including the use of process, do not constitute state action." Id. at 538 (emphasis added) (citing Henderson v. Fisher, 631 F.2d 1115, 119 (3d Cir. 1980)

(per curiam) (state licensing and 97A at A11) (emphasis added). Given these circumstances, in the face of recorded judicial support of Rule 4 (f) (4), we conclude that, as a practical matter, it would have been illogical for either Green of First Federal to contemplate that the Rule was constitutionally deficient,[14] and that no additional deterrence could be achieved by punishing individuals who could not reasonably have known that their actions were improper. Under these conditions, therefore, we hold that in pursuing foreclosure under Rule 4 (f) (4) Green and First Federal acted in good faith that the rule was constitutional.

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[14] As we stated in Shipley I, 619 F. Supp. at 436, the decisions in Brown v. Federal National Mortgage Association, 359 A.2d 661 (Del. 1976) and Gelloff v. First National Bank of Frankford, 373 A.2d 206 (Del. 1977) did not address the issue of adequate notice presented by this case, and they cannot therefore be said to have alerted either Green or First Federal that Rule 4 (f) (4) violated mortgagors' due process rights.

Finally, we conclude that allowing private individuals to assert a good faith defense promotes the public interest because it allows recovery against individuals who take action that they know, or reasonably should know, violates clearly established statutory or constitutional rights of others, but at the same time permits individuals to use presumptively lawful state statutes without fear of facing constitutional litigation. For this reason, the major goals of section 1983 is still able to deter unlawful conduct and is still able to compensate victims of those who is bad faith use state laws or court rules to violate other's constitutional rights. Therefore, we hold that even if Green and First Federal were found to be state actors, they would still be entitled to assert a defense of qualified immunity from the section 1983 claims. They would in that

event still have no section 1983 liability because their motions for summary judgment on the section 1983 claims would be granted on the ground of qualified immunity.

c. Section 1982 Claim. Section 1982 of Title 42 of the United States Code provides that white citizens to inherit, purchase, lease, sell, hold, and convey real property. This section bars both private and public discrimination with respect to property rights; there is no requirement of state action. Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019, 2021 (1987) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)). While there is some authority for the proposition that statistical evidence can be used to establish racial discrimination in a section 1982 case, Lee v. Minnock, 417 F. Supp. 436, 439 & n.1 (W.D. Pa. 1976) affid mem. 556 F.2d 567 (3d Cir. 1977), the plaintiffs in

this case have failed to produce statistical evidence that could persuade us that either Green or First Federal acted with a discriminatory intent or in a discriminatory manner.

We conclude that the plaintiffs have not shown that either Green or First Federal acted in violation of section 1982 for two reasons: the plaintiffs have failed to prove that either Green or First Federal acted with an intent to discriminate and,

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 89-3072

JOHN S. SHIPLEY and
ROCHELLE D. SHIPLEY, his wife

vs.

FIRST FEDERAL SAVINGS BANK AND LOAN
ASSOCIATION OF DELAWARE (formerly known as
FIRST FEDERAL SAVINF AND LOAN ASSOCIATION
OF NEW CASTLE COUNTY),
and
JOSEPH B. GREEN, ESQUIRE of GREEN & GREEN
LAW OFFICES and
MICHAEL P. WALSH, Sheriff of New Castle
County, Delaware, and
MARGO EWING BANE, Prothonotary of New Castle
County, Delaware

JOHN S. SHIPLEY and
ROCHELLE D. SHIPLEY,

Appellants

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 84-521)
District Judge: Honorable Jane R. Roth

Submit
May 16, 1989
Before: MANSMANN, HUTCHINSON, and VAN DUSEN,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

Circuit Judge

Attest:

Sally Mryos, Clerk

Costs taxed in favor of Joseph B. Green, appellee as follows:

TOTAL OF BRIEF AND APPENDIX.....	$597.60

Costs taxed in favor of Margo E. Bane appellee as follows:

TOTAL OF BRIEF..................	$ 10.70

Certified as a true copy and issued in lieu of a formal mandate on June 29, 1989.

Test:

Cief Deputy Clerk, United States Court of
Appeals, for the Third Circuit